

2008


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Recommended Citation

Brown, Kevin D. and Sitapati, Vinay, "Lessons Learned from Comparing the Application of Constitutional Law and Anti-Discrimination Law to African Americans in the U.S. and Dalits in India in the Context of Higher Education" (2008). *Articles by Maurer Faculty*. Paper 44.

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LESSONS LEARNED FROM COMPARING THE APPLICATION OF CONSTITUTIONAL LAW AND FEDERAL ANTI- DISCRIMINATION LAW TO AFRICAN- AMERICANS IN THE U.S. AND DALITS IN INDIA IN THE CONTEXT OF HIGHER EDUCATION¹

Kevin D. Brown and Vinay Sitapati***

In this Article the authors will compare the development of constitutional law and federal anti-discrimination law in the context of higher education of African-Americans in the U.S. with Dalits in India. Both groups suffer from oppression and discrimination based upon a hereditary trait and related to their integration into mainstream society; neither group is completely isolated from the majority population responsible for the discrimination; and African-Americans and Dalits approximate similar percentages of their country's population. Based upon the 2000 census, African-Americans constitute 12.7% of the American population,² and, according to the 1991 Census Report of India, Dalits make up 16.5% of the

1. A draft of this article was presented by the authors at the "Comparative Constitutional Traditions in South Asia Conference" sponsored by The Paul H. Nitze School of Advanced International Studies of Johns Hopkins University, November 17 to 19, 2006 in London, England. We would like to thank the distinguished participants at the Conference for their many helpful suggestions. We would also like to thank Professor Japhet of the National Law School of India University and noted Dalit journalist from New Delhi, Chandrabhan Prasad, for their helpful insights over many years that have been incorporated into this article. We also want to acknowledge assistance we received from Professors Jeannie Bell, Robert Fischman, Don Gjerdingen, Feisal Istrabadi, Aviva Orenstein, Ken Dauschmidt, Reginald Robinson, Susan Williams and Lalit Khandare.

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2. See U.S. Bureau of the Census, Table 1: Population by Race, for Hispanic or Latino Origin for all Ages and for 18 years and older for the United States 2000 (Apr. 2, 2001).

Indian population.³ Yet, although African-Americans have been victims of hereditary racial oppression in the U.S. for almost 400 years, Dalits have suffered oppression for 3,500 years and counting.

In India, Caste Hindus have traditionally considered Dalits—members of society located below the caste system⁴—to be religiously polluted because of their hereditary occupations. Dalits were—and for the most part still are—confined to doing the worst work in India. Dalits take care of trash and body disposal, maintain the sewage system, clean toilets, work with dead animals, collect cow manure and turn it into cooking fuel, labor in the fields, work on leather, and dig the wells for water. For millennia, Caste Hindus denied Dalits the most basic human rights. They were denied access to Hindu temples and to formal education, prohibited from drawing water from public wells (often the very wells that they themselves dug), prevented from walking on the road in broad daylight and compelled to wear dirty clothes—if they were allowed to wear clothes at all. Caste Hindus segregated housing for Dalits and placed them on the outskirts of town.

Though India is one of humanity's oldest civilizations, the Republic of India was founded in 1947 when it gained independence from Great Britain's colonial control. For Dalits, the ratification of the Indian Constitution in 1950 marks the watershed moment for their legal rights. With the ratification of the Constitution, Indian society formally recognized the need to address the historic oppression of many groups, including the Dalits, which plagued Indian society for thousands of years.⁵ Many provisions were included in the Indian Constitution to address the discrimination Dalits faced. Regardless of the constitutionally required efforts aimed at advancing Dalits over the past 60 years, a "number of recent sociological studies indicate that . . . the idea of their inherent pollution continues to be what sets Dalits apart."⁶ A 2003 story in the National Geographic News on Dalit oppression started by stating:

Human rights abuses against these people, known as Dalits, are legion. A random sampling of headlines in mainstream Indian newspapers tells their story: "Dalit boy beaten to death for plucking flowers"; "Dalit tortured by cops for three days"; "Dalit 'witch' paraded naked in Bihar"; "Dalit killed in lock-up at Kurnool"; "7 Dalits burnt alive in caste clash"; "5 Dalits lynched

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3. *Scheduled Tribes and Scheduled Castes Population, 1991 Census of India*, at <http://www.censusindia.gov.in> (last visited Feb. 25, 2007). Many of the statistics which exist in the U.S. to demonstrate the socio-economic condition of blacks in comparison to other racial/ethnic groups do not exist for determining the situation of Dalits. As such, it is harder to find the statistics that quantify the socio-economic situation of Dalits.
 4. Members of this group prefer to be called "Dalits," which means broken, oppressed, or downtrodden. See John C.B. Webster, *Who is a Dalit?*, in UNTOUCHABLE: DALITS IN MODERN INDIA 11 (S.M. Michael ed., 1999), for a brief discussion of whom the term "Dalit" encompasses.
 5. John C.B. Webster, *Who Is a Dalit?*, in UNTOUCHABLE: DALITS IN MODERN INDIA 11, 21-23 (S.M. Michael ed., 1999).
 6. *Id.* at 13.

in Haryana"; "Dalit woman gang-raped, paraded naked"; "Police egged on mob to lynch Dalits."⁷

According to Government of India statistics, in 1986-87 only 21.38% of Dalits were literate, 16% lived in urban areas, 48% were agricultural laborers, 4% were employed in industrial occupations, and 50% lived below the poverty line (compared to 30% of the entire population living below the poverty line).⁸ Half of Dalits are landless agricultural laborers, and only 7% have access to safe drinking water, electricity and toilets.⁹ A survey of forty-one Indian higher education institutions showed that Dalits constituted only 0.61% of the professors, 1.04% of the associate professors, and 3.16% of the lecturers.¹⁰ In a society still marked in many places by deprivation and destitution, Dalits are the most deprived and destitute.

In contrast to African-Americans, Dalits have not made significant progress towards eradication of their historic oppression over the past 60 years. Typically, when comparisons of the status and conditions of African-Americans are made to another group, it is with non-Hispanic whites in the United States. Due to the history of oppression suffered by the descendants of the soil of Africa in the U.S., there is good reason for this normal comparative framework. The comparison of differences between the social, economic, education or political status of blacks and non-Hispanic whites is intended to illuminate the progress, or lack thereof, in the efforts of American society to eliminate the effects of historic racial oppression. But such comparisons carry with them an inherent difficulty and enduring problem for African-Americans. This normal comparative framework used to judge the socio-economic condition of African-Americans in the United States systematically fails to appreciate the strengths of the African-American community and the positive aspects of its struggle for racial liberation.

No matter how much progress African-Americans have made, in such a comparative framework they are almost always portrayed as being too discriminated against, committing too many crimes, too poor, too unemployed, too undereducated, too short-lived, too underrepresented, or having standardized test scores that are too low. Even if progress on the road to racial equality is recognized, the almost always concomitant recognition is that African-Americans still have a long way to travel before they reach their goal. Thus, the fire of the victory celebrations for the accomplishments of African-Americans is drowned in the water of despair that comes from the recognition that much is left to be done.

7. Hillary Mayell, *India's "Untouchables" Face Violence, Discrimination*, NATIONAL GEOGRAPHIC NEWS, June 2, 2003, http://news.nationalgeographic.com/news/2003/06/0602_030602_untouchables.html (last visited Dec. 13, 2007).

8. B.L. Mungekar, *State, Market, and the Dalits*, in *UNTOUCHABLE: DALITS IN MODERN INDIA* 131, 134 (S.M. Michael ed., 1999).

9. Mari Marcel Thekaekara, *Combatting Caste*, THE NEW NATIONALIST, July 2005, http://www.newint.org/features/2005/07/01/combating_caste/ (internal citations omitted).

10. Mungekar, *supra* note 8, at 137.

Notwithstanding the societal differences between the United States and India, this comparison of the application of constitutional and federal discrimination laws to the higher education opportunities for African-Americans and Dalits should yield some important lessons, especially for appreciating the African-American struggle for equality. Our intention in this Article is to look at African-Americans from a comparative framework that is positive as opposed to negative. In so doing we can highlight some of the successes of the African-American Community in its historic struggle and the strengths in American society that can make continued advancement possible.

There are a number of reasons to focus on opportunities for higher education. First, globalization has increased the value of knowledge. Higher education is where the most valued knowledge is created and disseminated. Second, in the United States, prestigious occupational opportunities are tied to education credentials. Thus, the best way to assure an individual access to a socially and economically advantageous career in the U.S. is through ensuring access to a college or university degree. For Indians the benefits of globalization are often tied to education as well. Those who seem to benefit the most in India from globalization are in the service sector.¹¹ Education is a critical determinant of who receives the most sought-after employment opportunities in that sector. Third, policy making in India is dominated by upper caste Hindus whose percentages in important social positions far exceeds their percentage of the population.¹² More Dalits in higher education should translate into more Dalits in decision making positions in the economy, media, politics and education. The same holds true in the United States as well. Holders of degrees from higher education institutions in the United States come to occupy the boardrooms, the corner offices, the faculty lounges, the press rooms, the Courthouses and the Statehouses. Higher education is also a hedge for both individual blacks in the United States and Dalits in India to combat negative stereotypical assumptions that have long plagued members of these groups. Finally, individuals who have tremendous influence over society's culture are primarily those who are well-educated. Thus, access to higher education can also influence how society regards Dalits and African-Americans in the future.

11. India's manufacturing and service sectors have grown at an average of around 9% in the last 10 years. However, agriculture has only grown at around 2% in the same period, even though 60% of the Indian labor force is in agriculture. See <http://www.indiadaily.com/editorial/3380.asp> (last visited Mar. 10, 2008). In addition, the service sector's share of GDP has grown from 43.69% in 1990-91 to 51.16% in 1998-99. In contrast, the agricultural sector's share has fallen from 30.93% to 26.83% in the respective years. See *An Analysis of India's Service Sector*, THE SERVICE SECTOR IN THE INDIAN ECONOMY, <http://www.indiaonestop.com/serviceindustry.htm> (last visited Dec. 27, 2007).

12. Data on this is naturally hard to find. But, for instance, a study of top media positions in India concluded that out of 315 top decision makers in media, 71% were upper caste men, while there were no Dalits at all in this list. See *Upper Castes Dominate National Media, Says Survey in Delhi*, THE HINDU, June 5, 2006, <http://www.hinduonnet.com/2006/06/05/stories/2006060504981400.htm>.

Section I will present an overview of the legal treatment of African-Americans and Dalits over time. Section II will discuss the application of constitutional law and federal anti-discrimination law to African-Americans in the context of higher education. Section III will discuss the application of constitutional law and federal anti-discrimination law to Dalits in the context of higher education. Section IV will discuss five principal lessons learned from this comparison. First, judicial interpretation of each country's constitutional equal protection clause reduced educational opportunities for the oppressed. This simply reflects the double-edged-sword nature of individual rights. On one hand, the theory of individual rights seeks to eradicate conscious discrimination, yet on the other hand, it provides the logic to undercut policies and programs motivated by a conscious desire to attenuate the effects of that discrimination because they take specific traits into account. Such policies are often viewed as reverse discrimination. The second lesson evidences the benefits of having a specific provision in the Constitution to protect the government when it makes special provisions for the advancement of oppressed groups. The Indian Constitution includes such a provision but the United States Constitution does not.

The third lesson derives from comparing the justifications for affirmative action that exist in the United States to those for reservations in India. Justice O'Connor's opinion for the Court in *Grutter v. Bollinger*¹³ identified substantial benefits from affirmative action, including bettering cross-racial understanding, breaking down racial stereotypes, and improving national security. In contrast, the only justification for reserving seats for Dalits in higher education in India is compensating for the long history of untouchability and oppression. In the United States, many proponents of affirmative action, including one of the authors,¹⁴ would justify it on similar notions of responding to historic discrimination. This presents the rhetorical question of whether it is better to enter into an institution of higher learning with the goal of learning from a diverse group, or due to a sense of guilt about the past oppressive treatment of one's group. Justifications for affirmative action in the United States carry a much more positive connotation than the rationales for reservations for Dalits. Fourth, a system of historically black colleges and universities (HBCUs) were created during the "separate but equal" era in the United States, providing many blacks with opportunities for higher education and becoming symbolic of self-help. The normal debate surrounding HBCUs in the United States evidences the paradox of their existence. HBCUs are criticized for their shortcomings in comparison to mainstream higher educational institutions, yet praised because they are essential institutions serving the interests and needs of the black community. As Professor Gil Kujovik put it, "the worst qualities of the colleges made them candidates for extinction while their best qualities made them essential institutions serving the

13. 539 U.S. 306 (2003).

14. See, e.g., Kevin Brown, *The Hypothetical Opinion in Grutter v. Bollinger From the Perspective of the Road Not Taken in Brown v. Board of Education*, 36 LOY. U. CHI. L.J. 83 (2004); Kevin Brown, *The Racial Gap in Ability: From the Fifteenth Century to Grutter and Gratz*, 78 TUL. L. REV. 2061 (2004).

needs of the black community.”¹⁵ While African-Americans had access to education at HBCUs, Dalits were not admitted to any educational institution, and therefore did not enjoy this marginal success that African-Americans did.

The fifth lesson relates to the changing racial and ethnic make-up of blacks benefiting from affirmative action. Currently, most affirmative action programs at selective colleges, universities, and graduate programs do not draw racial and ethnic distinctions among black applicants. There is growing evidence, however, of an increasing under-representation of “Ascendants” among black college students.¹⁶ Terminology is going to be a very difficult aspect of this part of the Article because it requires that we think of blacks in the United States with conscious reference to their ancestry. We use the term “Ascendants” to refer to two different groups of people. The first group is composed of those born in the United States who have four grandparents that would have been considered as “black” Americans at the time they were born.¹⁷ These Ascendants are third-generation African-Americans. However, due to historic racial oppression, the disdain for interracial marriage and classification of mixed-race black children as “black” for such a long period of America’s history, we believe that any individual with a significant amount of black ancestry born before the Supreme Court’s 1967 opinion in *Loving v. Virginia*¹⁸ should also be considered as an Ascendant.¹⁹ Such a person would have grown up in conditions where the racism of his or her time demanded that he or she consider himself or herself to be black, despite a mixed-race heritage. The reason that we are using the term Ascendants in this case is to identify the line of ancestry through to ancestors who were chattel slavery and/or experienced segregation.²⁰ We use the term “Black Biracials” to

15. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 159 (1987).

16. Harvard professors Dr. Henry Louis Gates Jr. and Lani Guinier pointed out during a black alumni gathering in 2003 that both the children of African and Caribbean immigrants and the children of biracial couples together comprised two-thirds of Harvard’s black undergraduate population. A year later an article by Ronald Roach pointed to the fact that a report of the black presence in elite colleges and universities revealed that 41% of black freshmen at 28 selective schools identified themselves as immigrants, children of immigrants or mixed-race. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE ISSUES IN HIGHER EDUCATION, Aug. 25, 2005, http://www.diverseeducation.com/artman/publish/article_4558.shtml (last visited Dec. 10, 2007).

17. According to Census Bureau data from the 2000 census, 89.9% of blacks were third generation or higher. See Dianne Schmidley, *Profile of the Foreign-Born Population in the United States*, 2000 U.S. Census Bureau, Current Population Reports Series P-23-2006, 24 (2001).

18. 388 U.S. 1 (1967) (striking down anti-miscegenation statutes).

19. We do not believe that there is any particular magic in using 1967 as our date (for a discussion on this, see RAINER SPENCER, CHALLENGING MULTIRACIAL IDENTITY 63-82 (2006)). However, we see it as a convenient date for this discussion.

20. We wish to also specifically acknowledge the insightful article written by Professor Angela Onwuachi Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1141 (2007). She used the term “Descendants” or “Legacy Blacks” to denote these blacks to make the connection between their ancestral lineage as descended from blacks who were enslaved and/or segregated. She credits Professor Derrick Bell of New York University Law School with providing her with the term. *Id.* at 1149. We use

refer to individuals born after the Supreme Court's 1967 decision in *Loving* who have one parent that is black and one that is not. We use the term "Black Immigrants" to refer to individuals who were born in a foreign land or have at least one parent born outside of the United States. We use the terms "Black," "African-American," or "black" in the historic and inclusive sense of referring to all people in the United States who are of African descent.²¹ It is too early to tell what impact the increasing diversity of the black population will have on affirmative action. However, increasing interracial marriages and cohabitation reflect weakening racial barriers and increasing social interaction between racial groups in America. In India, however, racial barriers remain strong. Dalits who marry Caste Hindus often must flee their homes to avoid "honor killings" by relatives of the higher-caste spouse.

I. DOMINANT HISTORICAL LEGAL TREATMENT OF AFRICAN-AMERICANS AND DALITS THROUGH THE MODERN ERA

A. *Legal Treatment of African-Americans in the United States from the Colonial Period through the Era of Legal Segregation*

The first successful British colony planted in North America by the British was at Jamestown, Virginia in 1607. John Rolfe's casual reference to the arrival of black slaves in Jamestown twelve years later is generally regarded as the first time Africans were imported into British North America.²² By the time the Founding Fathers met in Philadelphia in 1787, blacks had been in North America for almost 170 years, and inclusion of chattel slavery as an institution in the Constitution was a foregone conclusion. Not one of the fifty-five delegates present at the Constitutional Convention seriously advocated the abolition of slavery.²³ Instead, the Founding Fathers addressed it in a number of provisions, the most important of which was the infamous Three-Fifths Clause.²⁴

During the slavery era, the most authoritative legal decision delivered by the Supreme Court delineating the constitutional rights of blacks was

the term "Ascendant" because, in keeping with the general tenor of this article, it is a more positive meaning that respects blacks' overcoming of aspects of America's legacy of racial subordination. Without this overcoming by Ascendants, conditions in the U.S. may not have changed enough to provide for a significant number of Black Biracial children and immigration by blacks to the United States from other parts of the world.

21. We will also be citing to various statistical reports and documents throughout this Article. When we do so, we will use the terms that were used in those reports and documents.
22. CAPTAIN JOHN SMITH, *THE GENERALL HISTORIE OF VIRGINIA, NEW ENGLAND, AND THE SUMMER ISLES* 246-47 (vol. 1, 1907). This account can also be found reprinted in *CIVIL RIGHTS AND AFRICAN-AMERICANS* 4 (Albert P. Blaustein & Robert L. Zangrando eds., 1991).
23. See JOE R. FEAGIN, *RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS* 12 (2000).
24. See, e.g., James Madison, *Federalist Papers No. 54* (1788) ("The Federal Constitution, therefore, decides with great propriety on the case of our slaves, when it views them in the mixt character of persons and property. This is in fact their true character.").

Chief Justice Taney's opinion in *Dred Scott v. Sandford*.²⁵ Dred Scott was a slave whose master took him into the State of Illinois, which prohibited slavery, and into a federal government-controlled territory that also banned slavery.²⁶ Scott sought his freedom by going to federal court and arguing that a slave brought onto free soil was a free man.²⁷ In concluding that the slave and would-be free man, Dred Scott, could not sue in federal court to obtain his freedom, Chief Justice Taney examined the original intent of the Founders of the United States.²⁸ Taney stated that people of African descent—slave or free—were not considered by the Founders to be citizens within the definition of the Constitution.²⁹ As a result, the federal courts were closed to them.³⁰ Taney went on to summarize the basic constitutional view of the Founding Fathers regarding the rights of blacks in the following way:

[Blacks] had for more than a century before [the Declaration of Independence] been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect.³¹

During the slavery era, the overwhelming majority of blacks lived in the South and were slaves. The 1860 census revealed that 92% of blacks lived in slaveholding states and 94% of them were in bondage.³² Though blacks were generally not slaves in the North before the Civil War, they were locked into the bottom of the racial social order by custom, if not by law. Blacks were systematically separated from whites or excluded from railway cars, omnibuses, stagecoaches and steamboats; they were segregated into "secluded and remote corners of theaters and lecture halls; they could not enter most hotels, restaurants and resorts, except as servants"; they prayed in separate pews and partook of the sacrament of the Eucharist after whites.³³ They were segregated in housing, schools, hospitals and cemeteries. Segregation came to encompass virtually all aspects of life, literally extending from the cradle to the grave.

Even though there were abolitionist movements and individuals that sought to restrict the spread of slavery, slavery was firmly rooted in the soil of the southern states during this period. It took a national crisis of such a magnitude that it threatened the disintegration of the Union to terminate slavery. Such a crisis developed after the presidential election of 1860. Abraham Lincoln, though opposed to the institution of slavery,

25. 60 U.S. 393 (1857).

26. *Id.* at 431.

27. *Id.* at 427.

28. *Id.* at 407-18.

29. *Id.* at 427.

30. *Id.* at 445-46.

31. *Id.* at 407.

32. U.S. BUREAU OF THE CENSUS, Ser. P-23, No. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 13 (1979).

33. See LEON F. LITWACK, NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES (1961) (presenting an authoritative account of the treatment of African-Americans north of the Mason Dixon Line).

came into the Presidency emphasizing that he only wished to prevent its expansion. Lincoln attempted to avert a civil war and was willing to accept a proposed amendment to the Constitution that would guarantee slavery in the South.³⁴ While the amendment was approved by both houses of Congress,³⁵ this effort was too little and too late to avoid secession and Civil War.

Using his constitutional powers as the Commander-in-Chief of the Armed Forces, on January 1, 1863, Lincoln signed the Emancipation Proclamation. The Proclamation, however, only sought to free slaves that were in the areas then in rebellion. Excluded from its provisions were slaves in Delaware, Kentucky, Maryland, Missouri, portions of Louisiana and Virginia, and in the areas of Tennessee occupied by the Union.³⁶ As a result, the Emancipation Proclamation left over one million black slaves in the hands of masters who were considered loyal to the Union. Ratification of the Thirteenth Amendment in December 1865, however, eliminated any lingering instances of slavery.

Black troops played a significant role in the ultimate defeat of the Confederate Army. In a public letter written in September 1864, Lincoln noted that if you threw away the support of black troops, you would throw away the Union.³⁷ They volunteered and served in huge numbers. Official statistics show that almost 179,000 black soldiers served in the Union army.³⁸ An additional 29,000 comprised 25% of the Union sailors.³⁹ Approximately 37,300 black soldiers were killed during the war—over 10% of the Union soldiers killed in action and almost 1% of the black population of the country—which is a remarkably high number given the fact that they were generally excluded from fighting for the first twenty months of the war.⁴⁰

With the Civil War won and slavery abolished, the United States had to turn to the issues of reconstruction and lasting peace. The victory of the North on the battlefield and the heroic performance of black troops did not translate into an acceptance of blacks as equals, particularly in the war-torn South. As southern governments that participated in the rebellion were reconstituted in the summer and fall of 1865, the first order of legislative business was to address the status of the newly made freedmen. These southern legislators passed a series of laws that came to be known as the “Black Codes.” The goal of the Black Codes was to implement into law the oppression of blacks, specifically through forced la-

34. See FEAGIN, *supra* note 23, at 57.

35. See *id.*

36. See ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877*, at 1 (1988).

37. See JAMES M. MCPHERSON, *THE NEGRO'S CIVIL WAR* 238 (1991).

38. See JAMES M. MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* 355 (1991).

39. MAULANA KARENGA, *INTRODUCTION TO BLACK STUDIES* 144 (2nd ed. 1993).

40. It has been estimated that the mortality rates of the black troops was 40% higher than that of white troops. See JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS* 70 (6th ed. 1988).

bor.⁴¹ Among the provisions in various Black Codes were requirements that the former slaves sign labor contracts by the beginning of the year with the landowners that could not be broken during that year.⁴² These contracts generally provided for agricultural labor.⁴³ All black persons not gainfully employed as of the first of the year were considered vagrants and, upon conviction, were fined and imprisoned.⁴⁴ If the landowner or some other person paid their fines, the convicted were placed in wardship of the payor until the debt was repaid.⁴⁵ Opportunities for black workers were severely limited. Prohibited from owning their own land, they were compelled to work for others.⁴⁶ They were also restricted in other areas of life: prohibited from owning firearms; prohibited from testifying against whites; and segregated on public transportation.⁴⁷

From 1865 to 1870, three Amendments—the Thirteenth, Fourteenth and Fifteenth, collectively referred to as the “Reconstruction Amendments”—were added to the Constitution. The principal motivation for the Reconstruction Amendments was the desire to protect the rights of the newly freed blacks. The 39th Congress assembled in Washington D.C. in January 1866 against the backdrop of the adoption of the Black Codes and recalcitrance from the reconstituted southern governments. The session started with a continuation of the Civil War ban prohibiting citizens from the eleven states that participated in the rebellion from serving in Congress. Congress began to debate a civil rights bill (the Civil Rights Act of 1866) that would give meaning to the Thirteenth Amendment by assuring that black people possessed basic civil rights.⁴⁸ In addition, the unintended impacts of the Thirteenth Amendment needed to be addressed. When slaves were freed, they no longer constituted three-fifths of a person, which would increase the apportionment to slaveholding states of representatives in the lower house of Congress and votes in the Electoral College. The Thirteenth Amendment, then, would actually increase the voting power of the states that had the most slaves before the Civil War, redistributing political power at the national level in favor of the very states that had rebelled.

Congress debated the Fourteenth Amendment during the first months of its 1866 term. Section 1 of the Amendment bestowed upon blacks the status of citizenship of the United States and the state where they resided; prohibited states from abridging their privileges or immunities as citizens of the United States; prohibited states from depriving them of life, liberty or property without due process; and granted them the equal protection of the laws.⁴⁹ The Amendment, however, did not grant black males politi-

41. See, e.g., RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 44 (2004).

42. See, e.g., *id.*

43. See, e.g., *id.*

44. See, e.g., *id.*

45. See, e.g., *id.*

46. See, e.g., *id.*

47. See, e.g., KLUGER, *supra* note 41, at 630.

48. See e.g., *id.* at 46-47.

49. U.S. CONST. amend. XIV, § 1.

cal equality.⁵⁰ Section 2 dealt with the anomaly created by the abolition of slavery and was also intended to be an inducement to the states to encourage them to grant black males the right to vote. Under this provision, if a state enfranchised the freedmen, then the former slaves would count in determining the state's representation in the lower house of Congress and the Electoral College. But if a state refused to grant the right to vote to the freedmen over the age of 21, then the state's representation would be reduced in proportion to the number such freedmen bore to the whole number of the male population over the age of 21.⁵¹

During the second half of 1866, ten of the eleven states of the former Confederacy rejected the Fourteenth Amendment.⁵² In response, Congress disbanded their governments and divided those states into five military districts under commanders authorized to use the army to protect life and property.⁵³ To gain readmittance as states, the districts had to ratify the Fourteenth Amendment and hold a constitutional convention to include universal suffrage in the new states' constitutions.⁵⁴ In February of 1870, the Fifteenth Amendment was added to the Constitution, prohibiting denial or abridgement of the right to vote based upon race, color or condition of previous servitude.⁵⁵

In an 1873 opinion that became known as the *Slaughterhouse Cases*, the Supreme Court openly embraced the Reconstruction Amendments, stating:

On the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him. *It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth.*⁵⁶

50. At this point American society disenfranchised women as well. The 19th Amendment, which forbids the United States or any state from denying or abridging the right to vote based on sex, was not ratified until 1920.

51. U.S. CONST. amend. XIV, § 2. Section 3 of the Fourteenth Amendment barred from any civil or military office at both the state and federal levels those who served in federal or state office and then engaged in the rebellion. Thus, Section 3 made virtually the entire political leadership of the former Confederate states before the war ineligible for public office. In so doing, Section 3 sought to institute a sweeping change in southern politics—without granting blacks the right to vote—by attempting to ensure that whites who were loyal to the Union controlled the reconstituted southern governments. Section 4 invalidated all public debt issued by the rebellious states to support the Confederacy. U.S. CONST. amend. XIV, § 3, 4.

52. See KLUGER, *supra* note 41, at 47.

53. See *id.*

54. See *id.* at 47-49.

55. U.S. CONST. amend. XV.

56. See *The Slaughterhouse Cases*, 83 U.S. 36, 71-72 (1873) (emphasis added).

The Supreme Court in that opinion went on to make a specific statement about the limits of the Equal Protection Clause:

We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency, that a strong case would be necessary for its application to any other.⁵⁷

An important turning point for the new rights of blacks was the disputed Presidential election of 1876 between Republican Rutherford B. Hayes and Democrat Samuel Tilden. As part of what became known as the "Compromise of 1877," the Democrats agreed to allow the Republican candidate to become President in exchange for withdrawing the federal troops in place to protect the rights of the freedmen in the former Confederate states, leaving the fate of blacks in the hands of the states.⁵⁸ Although southern politicians pledged to protect the new legal rights of the freedmen, during the 1880s and 1890s, blacks were eliminated as an effective voting force in the South. State legislatures then began to enact segregation policies into law.

Legal segregation was upheld in *Plessy v. Ferguson*, when the Supreme Court addressed an equal protection challenge to a statute requiring "separate but equal" accommodations on a railroad passenger car.⁵⁹ Justice Brown's opinion for the Court stated that "in the nature of things [the Fourteenth Amendment] could not have been intended to abolish distinctions based upon color or to enforce social, as distinguished from political equality."⁶⁰ Brown goes on to note "[i]f one race be inferior to the other socially, the Constitution of the United States cannot put them upon the same plane."⁶¹ Thus, segregation based upon the belief that blacks were inferior to whites had been codified into law.

Three years after *Plessy*, the Court, in a public education decision, signaled that the requirement of equality did not need to be taken literally. In *Cumming v. Richmond County Board of Education*, the Supreme Court permitted the Board of Education to apply tax revenue to subsidize the cost of high school education for white students, but provide no subsidy for black high school students.⁶² Even though the facts of the *Cumming* case were somewhat unusual and the legal arguments made on behalf of the black community mishandled, *Cumming* came to stand for the proposition that while separation was clearly constitutional, equality was not required.⁶³ After *Plessy*, segregation statutes quickly spread throughout much of the southern United States.

57. *Id.* at 81.

58. See JOE R. FEAGIN, RACIST AMERICA: ROOTS, CURRENT REALITIES, AND FUTURE REPARATIONS 58 (2000).

59. 163 U.S. 537 (1896).

60. *Id.* at 544.

61. *Id.* at 551-52.

62. 175 U.S. 528 (1899).

63. KEVIN BROWN, RACE, LAW AND EDUCATION IN THE POST-DESEGREGATION ERA: FOUR PERSPECTIVES ON DESEGREGATION AND RESEGREGATION 58 (2005).

The era of legal segregation continued until 1954, when *Brown v. Board of Education*⁶⁴ dealt a mortal blow to legal segregation and ushered in a very different constitutional regime for African-Americans. The Court's opinion in *Brown* is recognized as the first time that the U.S. attempted to extend its basic creed of liberty and justice for all to African-Americans.

B. Legal Treatment of Dalits up to Ratification of the Constitution

Around 16% of India's population (approximately 160 million people) are Dalits.⁶⁵ Dalits have also been called "untouchables," "outcastes," and "avama" or "panchamas" (the fifth caste) to illustrate that they fall outside the four recognized castes in Hinduism. In 1919, the controlling British government changed these degrading terms to "Depressed Classes."⁶⁶ The leader of India's Independence movement, Mahatma Gandhi, preferred using the term "*Harijans*" (people of God).⁶⁷ However, many Dalit leaders felt that this term was condescending. For instance, Dr. B.R. Ambedkar, the brilliant lawyer and an ardent advocate of the Dalit rights, rejected Gandhi's terminology and proposed the term "Protestant Hindus."⁶⁸ In 1935, the British government developed a list of Dalit subcastes that it defined as the "Schedule Castes."⁶⁹ After Independence, the Indian Constitution continued to use the term "Schedule Castes."⁷⁰ Thus, all official documentation refers to Dalits as "Scheduled Castes." This Article uses the terms Dalits and "Schedule Castes" interchangeably.

The renowned Indian historian S.K. Chatterjee defines Dalits as pre-Aryan people who have lived for thousands of years on the Indian soil.⁷¹ The conventional (though controversial) theory of Indian history is that around 1500 B.C.E., Aryans from central Asia invaded the Indian subcon-

64. 347 U.S. 483 (1954).

65. *Scheduled Tribes and Scheduled Castes Population, 1991 Census of India*, available at <http://www.censusindia.net/scst.html> (last visited Sep. 21, 2006).

66. Government of India Act (1919).

67. Paul F. Power, *Harijan: A Journal of Applied Gandhism, 1933-1955*, 70 AM. POL. SCI. REV. 651, 651 (1976) (book review).

68. Robert Traer, *Buddhist Affirmations of Human Rights*, 8 BUDDHIST-CHRISTIAN STUD. 13, 13 (1988).

69. Government of India Act s. 305 (1935) brought the term 'Scheduled Castes' into use, and defined the group as including "such castes, races or tribes or parts of groups within castes, races or tribes, which appear to His Majesty in Council to correspond to the classes of persons formerly known as the 'Depressed Classes,' as His Majesty in Council may prefer." This decidedly vague definition was clarified in The Government of India Scheduled Castes Order (1936), which contained a list, or Schedule, of castes throughout the British provinces.

70. INDIA CONST. art. 366, cl. 24 defines "Scheduled Caste" to mean such castes, races or tribes or parts of or groups which are deemed under INDIA CONST. art. 341 to be Scheduled Castes for the purposes of this Constitution. INDIA CONST. art. 341, cl. 1 empowers the President of India to specify the castes, races or tribes or parts or groups within castes that can be deemed to be Scheduled Castes. It is then the role of Parliament (as per INDIA CONST., art. 341, cl. 2) to make law concerning the groups thus designated. It is important to note that this precludes the role of the Courts in scrutinizing this initial right of the President, and subsequent right of Parliament.

71. See Felix Raj SJ, *Religion And Dalit Identity*, The Goethals Indian Library and Research Society, <http://www.goethals.org/rdiden.htm> (last visited Oct. 1, 2006).

continent and subjugated the Dravidian race, who were believed to be the original inhabitants of the subcontinent.⁷² Progressive Dalit groups believe that they were the original inhabitants of the Indian subcontinent.⁷³ They point to the fact that the Aryans (whom they hold to be the upper castes Hindus of today) had distinct features such as fair skin and sharp facial features, while Dalits have darker skin.⁷⁴ Other explanations for the origin of Dalits interpret differences in physical features to mean that they belong to a race closely allied with the Africans and Australoids.⁷⁵ These theories are controversial and are by no means universally accepted, and their resolve is beyond the scope of this Article; we mean to focus not on the origin of Dalits, but the oppression they have suffered over time.

This oppression can best be understood in the context of India's caste system. In traditional Hindu society, occupations were allocated among different social groups according to Hindu law and custom that demonstrated the "classic expression of inequality [through] caste."⁷⁶ The caste system can be broken down into four distinct 'varnas' or occupational groupings: the Brahmins (priests and teachers), the Kshatriyas [Kshatriyas] (rulers and soldiers), the Vais [Vaishyas] (merchants and traders), and the Shudras [Sudras] (labourers and artisans).⁷⁷ The first three caste groups dominate Indian society, and are collectively referred to as 'high caste' or 'forward caste' Hindus.⁷⁸ The Shudras are to serve the other three castes and are stigmatized by Hindu society, made outcasts and prevented from earning and accumulating wealth. Below the Shudras, however, are the Dalits. Each of these five broad groups can be broken down into subcastes or "jatis," which further define an individual's position in

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72. This theory, first used by Indologist Max Mueller, was accepted by the social reformer Jyotiba Phule in Maharashtra, who went on to argue that, therefore, the inheritors of the land in India are the lower castes because they are the original Indians and the upper castes are the Aryans that came as alien invaders. One of India's foremost historians, Romila Thapar, discusses these theories in *The Aryan Question Revisited*, transcript of lecture delivered on October 11, 1999, at the Academic Staff College, JNU, <http://members.tripod.com/ascjnu/aryan.html> (last visited Feb. 18, 2008).
73. DALIT VOICE, Homepage, <http://www.dalitvoice.org/about.htm> (last visited Mar. 22, 2008).
74. V.T. Rajshekar, *Reply to Anit-reservation Racists*, DALIT VOICE, <http://www.dalitvoice.org/Templates/august2006/articles.htm> (last visited Mar. 22, 2008).
75. THE SUNDROID (INDO-AFRICAN) RACE, http://www.geocities.com/Athens/Ithaca/1335/Anthro/sud_afr.html (last visited Feb. 18, 2008).
76. SRINIVAS, CASTE IN MODERN INDIAN AND OTHER ESSAYS 88 (1962).
77. See DEVANESAN NESIAH, DISCRIMINATION WITH REASON? THE POLICY OF RESERVATIONS IN THE UNITED STATES, INDIA AND MALAYSIA 37 (1997).
78. It is estimated that Brahmins hold more than 70% of government posts. See Henry Chu, *A Gift for India's Inter-caste Couples*, L.A. TIMES, Nov. 4, 2007, at A6. In addition, Brahmins hold 78% of the judicial positions and approximately 50% of parliamentary seats in India. *India Human Rights Report*, NCBuy Country reference, www.ncbuy.com/reference/country/humanrights_toc.html?code=in (last visited Feb. 18, 2008) (The Human Rights report is submitted to the Congress of the United States of America by the Department of State. Reports address internationally recognized human rights issues for countries which receive assistance through the Foreign Assistance Act of 1961, and all other foreign countries which are members of the United Nations and which are not otherwise the subject of a human rights report under this act.).

Indian society.⁷⁹ There are an estimated 2000-3000 subcastes in modern India, “ranging from small groups of a few hundred individuals to large groups numbering a few million.”⁸⁰ Some jatis exist only in a particular locality, while others are found throughout India.⁸¹

A critical feature of the caste system is hierarchy. Every one of the subcastes is hierarchically ordered. Thus, the social order in Indian society is structured in terms of privileges and disabilities of groups rather than the rights of individuals. Markers of subcaste hierarchy tended to bind members of the same jatis together. The common history of a particular jati oppressing lower subcastes and experiencing oppression by higher subcastes produces a strong sense of group identity. Caste ensured that there was little concern in Indian society for the rights of individuals for thousands of years. Hindu society excluded whole segments of society from positions of respect and responsibility without consideration of individual talents, abilities or interests.⁸² The discriminatory treatment of Shudras was severe and encompassed every aspect of social life. The drafters of the Indian Constitution provided that the government could adopt policies and programs to address discrimination against “Other Backward Classes,” many of which would be Shudra subcastes. OBCs, therefore, consist of subcastes considered socially and educationally backwards, but not perceived to be Schedule Castes or Scheduled Tribes.⁸³

It is important to understand that while Shudras were victimized by the Hindu caste system, they fared far better than Dalits who were actually outside of the caste system. In a society where the hierarchy is structured on the concept of religious purity, Dalit status has historically been associated with occupations regarded as ritually impure. Caste Hindus segregated Dalits from full participation in Hindu religious, social, economic and political life. Not only did Caste Hindus prevent Dalits from entering the premises of Hindu temples or drawing water from drinking wells, but they also observed elaborate precautions to prevent incidental contact with Dalits.⁸⁴

79. See, e.g., G.S. GHURYE, *CASTE AND CLASS IN INDIA* 27 (1960); J.H. HUTTON, *CASTE IN INDIA* 2 (1961).

80. NESIAH, *supra* note 77, at 37.

81. *Id.*

82. See L. DUMONT, *HOMO HIERARCHIES: THE CASTE SYSTEM AND ITS IMPLICATIONS* 45 (1972); N.K. BOSE, *THE STRUCTURE OF HINDU SOCIETY* 28 (1975).

83. Schedule Tribes or *adivasis* comprise 8.2% of India's population, or 84 million people. Scheduled Castes & Scheduled Tribes Population, Census of India, *available at* http://www.censusindia.gov.in/Census_Data_2001/India_at_glance/scst.aspx (last visited Mar. 22, 2008). They live and draw sustenance from forests. Both commercial forestry and intensive agriculture have destroyed their way of life, and rendered them disadvantaged as a group. See *TRIBAL DEVELOPMENT IN INDIA: THE CONTEMPORARY DEBATE* (Govinda Chandra Rath ed., 2006). The Indian government officially recognizes these groups as “Scheduled Tribes.” They are often grouped together with *Dalits* in the category “Scheduled Castes and Tribes” in the Constitution of India. They enjoy the same affirmative action benefits as do Scheduled Castes. See articles 15(4) and 16(4) of the Constitution of India. Articles 340 and 341 are also identical to each other.

84. See NESIAH, *supra* note 77, at 38.

Mughal rule (established by Islamic invaders who ruled India from 1526 until the eighteenth century) generally did not change the social fabric or alter entrenched inequality with respect to Dalits. While Mughal rule primarily respected the hierarchical status quo, during British rule, Dalits were viewed as a political group for the first time,⁸⁵ primarily as a result of a larger struggle for self-rule waged by nationalist Indians. The early part of the twentieth century saw a flurry of activity by the British government to assess the feasibility of responsible self-government in India. Upper caste Indian elites led the movement for self-rule. Although they took their own social superiority for granted, these elites found their Hindu traditions viewed as backwards from the western prism of individualism and self-determination.⁸⁶ In response, they started to consider restructuring India into a society that respected individualism and self-determination, and they began to demand the corresponding individual rights.⁸⁷ The British, however, continued to view India as made up of discrete groups whose interests were fundamentally opposed to each other.⁸⁸

This disjuncture between a British construction of India as essentially group-based and the growing aspiration of the Indian elite that national unity and individual rights supersede 'traditional' social groupings gave rise to the biggest paradox of the nationalist movement. The British viewed India as a collection of discrete groups, while the upper caste Hindu supporters of self-rule embraced western individualism. The British perspective found support among several minority and oppressed groups in Indian society. For instance, Dalits did not need individual rights, Ambedkar argued, but group-based protection from continued oppression.⁸⁹ The Maharaja of Kolhapur also aggressively promoted the causes of the other "depressed classes."⁹⁰ He demanded special representation for them in local and legislative bodies and led a protest march preceding the Montagu-Chelmsford reforms.⁹¹

In 1935, the British passed the Government of India Act, designed to give Indian provinces greater self-rule and set up a national federal structure. The British incorporated reservation of seats for the "Depressed

85. V.B. Rawat, *Dalit movements at the Crossroads*, CROSSCURRENTS.ORG, Aug. 9, 2005, at <http://www.countercurrents.org/dalit-rawat090805.htm> (last visited Oct. 19, 2006).

86. B. Sivaramayya, *Equality and Inequality: the Legal Framework in EQUALITY AND INEQUALITY: THEORY AND PRACTICE* 48 (1983).

87. *Id.*

88. SUNITA PARIKH, *THE POLITICS OF PREFERENCE: DEMOCRATIC INSTITUTIONS AND AFFIRMATIVE ACTION IN THE UNITED STATES AND INDIA* 52 (1997).

89. LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* 130 (2003).

90. *See generally* Ian Copland, *The Maharaja of Kolhapur and the Non-Brahmin Movement, 1902-10*, 7 *MODERN ASIAN STUDIES* 209-25 (April 1973).

91. *Id.* The Montagu-Chelmsford Reforms were the first serious attempt by the British to introduce gradual self governance in India. An additional feature was the protection of minorities, and there was controversy as to what form the protection of caste minorities such as Dalits would take. The Montagu-Chelmsford report formed the basis for the Government of India Act, 1919. Modification to this Act was made in the Government of India Act, 1935, which served as the basis upon which the Constitution of Independent India was modeled.

Classes" (including Dalits) into the Act, which went into force in 1937.⁹² The Act brought the term "Scheduled Castes" into use. However, the legislative framework for reservations in higher education did not exist until the ratification of the Constitution in 1950.

If the inconsistency between the United States commitment to equality and its treatment of blacks is the American dilemma, "the reconciliation of traditional hierarchical concepts of [Indian] society with constitutional provisions for equality" is the Indian dilemma.⁹³ Sociologist André Béteille has termed this conflict "between legal order with its commitment to complete equality and the social order with its all pervasive stratification . . . the most manifest contradiction in everyday life in contemporary India."⁹⁴ The deliberations of the founding fathers of the Indian Constitution provide a glimpse into this dilemma.

The chair of the drafting committee of the Constituent Assembly was Dr. B.R. Ambedkar.⁹⁵ Even though Ambedkar was the chair, a consensual and deliberative process involving all the members of the Constituent Assembly framed the Indian Constitution.⁹⁶ Within each province, members were elected by legislators belonging to religious categories of Hindu (or 'general'), Muslim and Sikh.⁹⁷ The number of seats in each religious category was based upon its percentage of the population in that particular province as determined by the British census of 1932.⁹⁸ Caste, however, was not taken into consideration when reserving seats for the Constituent Assembly.

The dominant political party in India at the time was the Congress party of Mahatma Gandhi and Jawaharlal Nehru.⁹⁹ There were no 'caste'

92. Government of India Act, s. 305 (1935).

93. PARIKH, *supra* note 88, at 47.

94. Sivaramayya, *supra* note 86, at 84.

95. Constituent Assembly, at <http://parliamentofindia.nic.in/ls/debates/facts.htm> (last visited Oct. 23, 2007).

96. *Id.* Just prior to Independence in 1947, British India was divided into three administrative units: (1) States ruled directly by the British, and having a common provincial legislative structure; (2) Baluchistan, which was termed the Chief Commissioners Provinces; and (3) Princely States, who were de jure 'protectorates' of the British, through de facto control by them. *Id.* Members of the Constituent Assembly came from these three separate administrative units: (1) 292 members were elected through the Provincial Legislative Assemblies; (2) four members represented Baluchistan; and (3) 93 members represented the Indian Princely States. *Id.* In the category of seats elected by the Provincial Legislative Assemblies, the Muslim League claimed 73 of the 78 Muslim seats, the *Panthic Akalis* claimed three of the four Sikh seats, and the Congress Party claimed 202 of the 210 'general' seats. *Id.* While the original number of members to the Constituent Assembly was set at 389, the decision to partition India reduced the number to 299. *Id.* The reduction of 90 members came by reducing the numbers elected by the Provincial Legislative Assemblies in the Muslim-majority Northwest India (which became West Pakistan and is now the country of Pakistan) and Northeast India (which became East Pakistan and is now the country of Bangladesh). *Id.* Under the Mountbatten Plan of June 3, 1947, a separate Constituent Assembly was set up for Pakistan and representatives of some Provinces ceased to be members of the Assembly. *Id.*

97. *Id.*

98. *Id.*

99. See generally STANLEY A. KOCHANAK, *THE CONGRESS PARTY OF INDIA: THE DYNAMICS OF ONE-PARTY DEMOCRACY* (1969).

sub-categories within the Hindu or general seats and, thus, no reservations for Dalits.¹⁰⁰ The Congress leadership, however, sought to ensure adequate representation of minority groups such as Dalits in the 'general' category.¹⁰¹ Representatives of minority groups constituted about 37.5% of the post-partition Constituent Assembly, reflecting the makeup of Indian society.¹⁰² Among the Dalits included by Congress was Dr. Ambedkar. Most other Dalit members were from the Scheduled Caste Federation founded in 1942 by Ambedkar to fight for the rights of the Dalit community. The only reservations framers of the Indian Constitution permitted in the Constitution were for Schedule Castes and Schedule Tribes, for whom there had been no reservations in the Constituent Assembly itself.¹⁰³ However, the Constitution also included a special provision allowing the State to make provisions for the advancement of other socially and educationally backward classes of citizens.¹⁰⁴

As mentioned earlier, the Indian elite were strongly in favor of individual rights. But the Indian Constitution also had to resolve the conflicting interests of different caste and religious groups. The Constitution recognized the dilemma between group and individual rights and sought to resolve this fundamental conflict by accepting the importance of group life and seeking to enhance India's rich plural diversity, but within a framework of social reform and protection of individual rights. First, the framers prohibited discrimination on grounds of group association or affiliation including sex, caste, race, place of birth, residence or religion.¹⁰⁵ Second, the framers sought to protect, nurture, and advance the claims of traditional group life, especially those founded on religious beliefs and practices, social and cultural life, and language.¹⁰⁶ Third, the framers provided that group life would yield to the reasonable demands of public order, health, and morality and co-exist with India's general commitment

100. Ramnarayan S. Rawat, *Making Claims for Power: A New Agenda in Dalit Politics of Uttar Pradesh, 1946-48*, <http://www.sephis.org/pdf/rawatcambridge.pdf>.

101. *Id.*

102. "[A]ccording to the 1951 census 37.8% of the population were either non-Hindu or belonged to the Scheduled Castes and Tribes." James Chiriyankandath, *Constitutional Predilections*, <http://www.india-seminar.com/1999/484/484%20chiriyankandath.htm> (last visited Mar. 22, 2008).

103. Rawat, *supra* note 100.

104. INDIA CONST. art. 15, cl. 4.

105. INDIA CONST. art. 15, cl. 1.

106. The Indian Constitution stresses fundamental rights, asserts equality before the law, prohibits discrimination on grounds of religion, race, caste, sex, or place of birth, and guarantees the right to reside in any part of the territory of India. Collective rights are also specifically supported in the Constitution under Article 17, which abolishes untouchability, and under Article 15 cl. 4, which enables the State to make special provisions for the "advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes." The provisions on Scheduled Castes and Scheduled Tribes identify certain categories of peoples collectively and provide them with institutional protections to ensure them fair representation. Article 19(e) implies that indigenous peoples, peasants or other groups strongly tied to their land may remain on their land. In terms of international law, India has also ratified the principal human rights treaties which have provisions guaranteeing collective and group rights.

to social welfare and reform.¹⁰⁷ The fourth response to the conflicting interests was to create a just uniform civil code for personal laws that would resolve emerging controversies including the opening of temples.¹⁰⁸

The framers of the Indian Constitution saw the importance of individual equality and anti-discrimination provisions and reiterated this in several provisions of the Constitution. However, the framers also realized that mere anti-discrimination provisions could only guarantee a formal equality that would not be effective in combating the historically entrenched inequality. Resources are unequally distributed, and social customs are set in a hierarchical mode. The “right to equality, whether equal protection of the laws or equality of opportunity, would have little security without important changes in the [social] structure of [Indian] society.”¹⁰⁹ The framers thus saw the need for “special provisions,” or “affirmative action” for groups for whom mere anti-discrimination laws would not obliterate disadvantages caused by long histories of oppression.¹¹⁰ The Constitution explicitly identifies the groups eligible for reservations,¹¹¹ including Scheduled Castes and Scheduled Tribes and OBCs.¹¹² While the office of the President of India is largely ceremonial, Article 341(1) gave the President of India the initial power to determine which castes, or parts of castes, would constitute ‘Scheduled Castes.’¹¹³ Until the Indian Supreme Court decision in 1973,¹¹⁴ it was thought that only Parliament had the power to modify this list.¹¹⁵

Article 15(1) of the Indian Constitution specifically bars the state from discriminating against any citizen based upon race, caste, sex or place of birth. Like interpretations of the meaning of the Equal Protection Clause, this provision is limited to state actors and therefore does not apply to private parties.¹¹⁶ In 1951, Article 15(4) was added to the Constitution. It provides that “[n]othing in this article . . . shall prevent the State from

107. INDIA CONST. art. 25, cl. 2.

108. INDIA CONST. art. 17 (prohibition of untouchability); INDIA CONST. art. 44 (securing a uniform civil code); and INDIA CONST. art. 48 (ban on cow slaughter).

109. ANDRÉ BÉTEILLE, *SOCIETY AND POLITICS IN INDIA: ESSAYS IN A COMPARATIVE PERSPECTIVE* (1991).

110. *Id.*

111. INDIA CONST. arts. 341-42.

112. INDIA CONST. art. 15, cls. 3 and 4.

113. INDIA CONST. art. 341, cl. 1 (stating that “The President may with respect to any State or Union territory, and where it is a State, after consultation with the Governor thereof, by public notification, specify the castes, races or tribes or parts of or groups within castes, races or tribes which shall for the purposes of this Constitution be deemed to be Scheduled Castes in relation to that State or Union territory, as the case may be”).

114. *Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India Supreme Court, 1973).

115. INDIA CONST. art. 341, cl. 2 (stating that “Parliament may by law include in or exclude from the list of Scheduled Castes specified in a notification issued under clause (1) any caste, race or tribe or part of or group within any caste, race or tribe, but save as aforesaid a notification issued under the said clause shall not be varied by any subsequent notification”).

116. The word ‘state’ is broadly construed, and includes not only the federal and state legislature/executive, but any body that is controlled by them.

making any special provision for the advancement of any socially and educationally backward classes of citizens [OBCs] or for the Scheduled Castes and the Scheduled Tribes.”¹¹⁷ The phrase “making any special provision” is an open-ended phrase that allows the government to provide an array of facilities for promoting the interests of Schedule Castes and Scheduled Tribes.¹¹⁸ The Indian Supreme Court has upheld Article 15(4).¹¹⁹

117. INDIA CONST. art. 15, cl. 4. The Indian Constitution also included a special provision for the appointment of a Commission to investigate the conditions of socially and educationally backward classes other than Dalits and Scheduled Tribes. INDIA CONST. art. 340. This provision would eventually lead to reservations for OBCs, which has remained controversial in India to this day. For a discussion of the establishment of the first commission established under Article 340 and what happened in its aftermath, see MARC GALANTER, *COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA* 186–87 (1984). OBCs are generally low caste Hindus or Shudras. Eventually a commission chaired by a low caste Hindu member of Parliament, B.P. Mandal, was created. The Mandal Commission delivered recommendations on December 31, 1980 determining which other subcastes were socially and educationally backwards and recommending policies for their improvement. For a discussion of criteria used to determine which subcastes were socially and educationally backwards, see E.J. Prior, *Constitutional Fairness or Fraud on the Constitution?: Compensatory Discrimination in India*, 28 CASE W. RES. J. INT’L LAW 63, 83–84 (1996). The Commission noted that 22.5% of the Indian population was either Dalits or Scheduled Tribes and thus 22.5% of the government jobs had already been reserved on their behalf. Even though OBCs constituted 52% of the population, a prior Indian Supreme Court opinion had limited the maximum percentage of reservations to 50%. See *Balaji v. State of Mysore*, 50 A.I.R. 1963 S.C. 649, 663 (India 1963) (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution should generally be less than 50%). See also *Rajkumar v. Gulbarga University*, 77 A.I.R. 1990 (Kant.) 320, 332 (1990) (following the 50% limit for reservations). Thus, the Commission’s recommendations limited the reservations for government positions and admissions to higher education to 27% for the groups that it had defined as OBCs. The report went on to recommend that OBCs who obtained their public employment through open competition not count against the 27% reservation. Reservations should apply to promotions as well as initial employment. The reservations would also apply to all private sector organizations that are recipients of government financial assistance as well as all universities and colleges. Though the report was accepted, the recommendations were largely ignored.

In 1989, the coalition government of V.P. Singh came to power after defeating Indira Gandhi’s son, Rajiv Gandhi, and his Congress party. On August 7, 1990, Singh announced that he had accepted the Mandal Commission report and would immediately begin implementation of the reservations for OBCs at the national level. The decision by Singh to implement the Mandal Commission report set off a firestorm of protests across India. It eventually contributed to the collapse of his coalition government. In 1993, the Supreme Court upheld the recommendations as constitutional in *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 447 (India Supreme Court, 1993). Then Prime Minister, Narasimha Rao, announced his intention to comply with the Supreme Court’s opinion and to implement the recommendations contained in the Mandal Commission report as soon as was practical.

118. India has chosen to have a quota-based system, but there exist other permissible possibilities that the Indian state has not explored. Article 15(4) also allowed the State to make provisions for socially and educationally backwards classes other than OBCs.

119. The Indian Constitution is far easier to amend than the U.S. Constitution. All it takes to amend the Indian Constitution in most cases is a quorum of more than half of the members of each house in Parliament, and a two-thirds majority vote. However, the Indian Supreme Court has created a doctrine that limits the type of amendments that are possible. According to the Indian Supreme Court, no govern-

Ratification of the Indian Constitution in 1950 marks the watershed moment for their legal rights. With the ratification of the Constitution, Indian society formally recognized the need to address the historic oppression of many groups, including the Dalits, a need that had plagued Indian society for thousands of years.

II. IMPACTS OF CONSTITUTIONAL LAW AND FEDERAL ANTI-DISCRIMINATION LAW ON AFRICAN-AMERICANS IN HIGHER EDUCATION

This section will discuss four aspects of constitutional law and federal anti-discrimination law in the context of higher education opportunities for African-Americans. First, it will cover the development of the legal regime that prohibits colleges and universities that had remained all-white through the segregation era from continuing to refuse to admit black students. Second, we will consider whether affirmative action amounts to “special considerations” in the admissions process of selective colleges and universities. The U.S. Supreme Court first addressed affirmative action admissions policies in the 1978 case of *Regents of the University of California v. Bakke*.¹²⁰ Justice Powell’s controlling opinion for the Court rejected quotas or reservations of college admissions seats, but agreed that race could be used as a positive factor for blacks and other minorities in an individualized admissions process.¹²¹ The Supreme Court reaffirmed Justice Powell’s opinion in 2003 in the University of Michigan cases, *Grutter v. Bollinger*¹²² and *Gratz v. Bollinger*.¹²³ Third, we will consider the benefits of private and publicly funded historically black colleges and universities (HBCUs). Created during the segregation era, HBCUs remain a viable opportunity for black students and professors in higher education. Fourth, we will consider the impact of the diversifying racial/ethnic make-up of black students benefitting from affirmative action policies.

A. Non-discrimination in College and University Admissions

Opportunities for African-Americans to pursue higher education in the South in 1940 were grossly limited. Segregation laws generally banned them from white universities and black universities were inferior

ment action – whether constitutional amendment, legislation or executive action – can violate the core or ‘basic structure’ of the Constitution. *Keshavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India Supreme Court, 1973). As a result, amendments to the Constitution can be challenged as violating the core or basic structure of the Constitution.

Article 15(4) was inserted into the Indian Constitution in 1951, in response to the Indian Supreme Court holding in *State of Madras v. Champakam Dorairajan*, A.I.R. 1951 S.C. 226 (India Supreme Court, 1951), which had held affirmative action to be invalid under the equality clause in article Article 15(1). Article 15(4) has been upheld in several cases, most notably *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 447 (India Supreme Court, 1993).

120. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

121. *Id.*

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

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

in terms of curricular offerings, library materials, qualifications of faculty and physical accommodations. Discrimination was even greater at the graduate and professional school level. In 1940 only three of the seventeen segregationist states¹²⁴ — Virginia, Texas and North Carolina — offered graduate-level instruction at their HBCUs.¹²⁵ In addition, none of the approximately thirty HBCUs in the segregationist states offered any Ph.D. granting programs, and only two had professional schools.¹²⁶ One was the North Carolina College for Negroes, which had two programs: law school and library science.¹²⁷ The other professional school was the

124. Seventeen states and the District of Columbia were collectively referred to as the “segregationist states” because they maintained a rigid form of segregation. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 30 n.1 (1987). Eleven were part of the Confederacy: Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia. *Id.* Four of the segregationist states were the Border States during the Civil War: Delaware, Kentucky, Maryland, and Missouri. *Id.* At the time of the Civil War, slavery was legal in these states however, they refused to secede from the Union. West Virginia, which was carved out of Virginia during the Civil War, was the 16th state and Oklahoma was the 17th state. *Id.*

125. Kujovich, *supra* note 124, at 113.

126. The black professional schools were North Carolina College for Negroes School of Law and Library Science and Lincoln University Law School in Missouri. *Id.* at 113 n.303. The law school at Lincoln University was actually the result of the NAACP’s litigation success in Missouri *ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). The all-white University of Missouri Law School had refused to admit Lloyd Lionel Gaines because of his race. *State ex rel. Gaines v. Canada*, 113 S.W.2d 783, 784-85 (Mo. 1937), *rev’d*, 305 U.S. 337 (1938). The State of Missouri offered to pay Gaines’s extra expenses for a legal education in an out-of-state law school or, alternatively, to build a law school for African-Americans at Lincoln University, the black public college. *Id.* at 786. The Missouri Supreme Court found that the scholarship program was substantially equal to the opportunity offered white students at the University of Missouri and rejected Gaines’s challenge. *Id.* at 790.

In reversing, the Supreme Court noted that the validity of segregation laws “rest[ed] wholly upon the equality of the privileges which the laws give to the separated groups within the State.” *Gaines*, 305 U.S. at 349. While law schools in other states might have been every bit as good as that of the University of Missouri, the relevant question was what kind of opportunity the state of Missouri provided for the two racial groups. Missouri had given a privilege to whites, that of attending the University of Missouri Law School within the state, that it had not given to African-Americans. The Supreme Court ruled that Gaines “was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.” *Id.* at 352. Gaines never actually enrolled in the University of Missouri Law School. DIANE RAVITCH, *THE TROUBLED CRUSADE: AMERICAN EDUCATION, 1945-1980*, at 122 (1983). Therefore, we do not know what reaction his enrollment would have provoked. After the decision by the U.S. Supreme Court, the Missouri legislature established a law school for African-Americans at Lincoln University. *State ex rel. Gaines v. Canada*, 131 S.W.2d 217, 218-19 (Mo. 1939). The Missouri Supreme Court ruled that as long as the facilities at Lincoln University were “substantially equivalent” to those at the University of Missouri, the absence of other and proper provision for Gaines had been redressed, thus he had no right to attend the University of Missouri. *Id.* at 220. The NAACP was unable to locate Gaines in order to challenge this action by Missouri. See Lucile H. Bluford, *The Lloyd Gaines Story*, 32 J. EDUC. SOC. 242, 244-46 (1959).

127. See *supra* note 126.

recently-created law school at Lincoln University in Missouri.¹²⁸ In contrast, all seventeen segregationist states had white public colleges with extensive graduate and professional school programs. The number of different professional degrees offered at white public colleges was as follows: graduate engineering – 17, law – 16, medicine – 15, graduate commerce and business – 15, pharmacy – 14, library science – 11, social service – 9, and dentistry – 4.¹²⁹

Between 1938 and 1950, the United States Supreme Court addressed four cases dealing with segregation in graduate and professional schools, establishing the principle that graduate and professional schools could not refuse to admit students solely on the basis of race.¹³⁰ The Court quickly applied its unanimous 1954 opinion invalidating segregation in primary and secondary public education in *Brown v. Board of Education* to higher education generally.¹³¹

It took some time before state officials and administrators at white public colleges, universities and graduate programs began to dismantle their segregated student bodies and faculties. Nevertheless, the legal foundation had been laid. Private colleges and universities, however, were not subject to the anti-discrimination law until the Civil Rights Act of 1964, the most sweeping civil rights legislation in the history of the United States, was enacted. Title VI of the Act banned discrimination in all federally aided programs.¹³² Since private colleges and universities received federal funds, Title VI applied to them. The potential sanction of a cutoff of federal funds was enough to compel private higher education institutions to end their discriminatory practices against blacks.¹³³

B. Affirmative Action in Higher Education

In the 1960s, public and private colleges and universities began to establish special admissions programs in order to increase the number of black students. Until the 1970s, the U.S. generally considered itself a black/white nation. According to the 2000 census, blacks comprise 12.3% of the population, Hispanics 12.5% and Asians 3.6%.¹³⁴ But the Census Bureau's population statistics in 1970 revealed that blacks and whites

128. *Id.*

129. Gil Kujovich, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate But Equal*, 72 MINN. L. REV. 29, 113 n.303 (1987).

130. See *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sipuel v. Bd. of Regents of Univ. of Okla. State*, 332 U.S. 631 (1948); *Sweatt v. Painter*, 339 U.S. 629 (1950); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950).

131. See, e.g., *Florida ex rel. Hawkins v. Bd. of Control*, 350 U.S. 413 (1956) (finding segregation unconstitutional in graduate schools).

132. 42 U.S.C. § 2000d (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

133. See *Runyon v. McCrary*, 427 U.S. 160 (1976) (holding that 42 U.S.C. § 1981 (from the Civil Rights Act of 1866) prohibits private schools from excluding blacks from admissions based solely on race, regardless of federal funding).

134. See U.S. Bureau of the Census, Table 1: Population by Race, for Hispanic or Latino Origin for all Ages and for 18 years and older for the United States 2000 (Apr. 2, 2001).

comprised 98.5% of Americans.¹³⁵ Thus, during the time that colleges and universities began instituting affirmative action admissions policies, the dominant racial/ethnic paradigm was black/white, and affirmative action was intended to benefit black students.

While the special admissions programs of some colleges and universities limited their consideration of race to one of many factors in an individualized admissions decision process, others actually reserved a certain percentage of admissions seats for disadvantaged minorities, including blacks. For the latter group, admitting blacks (and other minorities) was part of an entirely separate process. The United States Supreme Court addressed one of these admission plans in 1978 in *Regents of the University of California v. Bakke*.¹³⁶

The Medical School of the University of California at Davis rejected Alan Bakke's application for admission.¹³⁷ In response, Bakke—a white male—sued in federal court.¹³⁸ Bakke alleged that the school's special admissions program—under which 16 of the 100 positions in the class were reserved for economically or educationally disadvantaged applicants—violated both the Equal Protection Clause and Title VI of the Civil Rights Act.¹³⁹ The Medical School viewed members of African-American, Chicano, Asian, or Native American heritage as exclusively fitting the description of disadvantaged applicants, and evaluated applicants from those groups in a separate admissions process from the regular process.¹⁴⁰

The Medical School argued that the Equal Protection Clause should apply differently depending on the race of the person raising such a claim. Strict scrutiny should be limited to challenges of governmental actions that would serve to disadvantage discrete and insular minorities.¹⁴¹ Since the special admissions plan did not disadvantage any discrete and insular minority groups, the Court should accord greater deference to the decision of the University to adopt such a plan. Four of the justices agreed with the University and were prepared to uphold the special admissions program, with its reservations for minorities.¹⁴² These justices saw Bakke's Title VI claim as coextensive with his equal protection claim.¹⁴³ Thus, for these justices the reservation of admissions seats did not violate either Title VI or the Equal Protection Clause. Four other justices, however, did not address the equal protection claim.¹⁴⁴ Instead, they were prepared to strike down the special admissions program as a violation of Title VI,

135. STEPHAN THERNSTROM, *THE DEMOGRAPHY OF RACIAL AND ETHNIC GROUPS* 12–13 (2001).

136. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

137. *Id.* at 276.

138. *Id.* at 277.

139. *Id.* at 278.

140. *Id.* at 274.

141. *Id.* at 288. The petitioners were relying upon the statement by the Supreme Court in *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

142. 438 U.S. at 324 (Brennan, J., White, J., Marshall, J., & Blackmun, J., dissenting).

143. *Id.* at 352.

144. *Id.* at 409 (Stevens, J., Burger, C.J., Stewart, J., & Rehnquist, J., concurring in the judgment in part and dissenting in part).

without reaching the constitutional claim.¹⁴⁵ These justices interpreted Title VI's ban on discrimination in federally funded programs to apply regardless of the race of the presumed beneficiaries.¹⁴⁶ For them, not only were reservations illegal, but any consideration of race in the admissions process violated the non-discriminatory provision of Title VI. One of the most extraordinary opinions in U.S. constitutional history, the controlling opinion in *Bakke*, was authored by a single person—Justice Lewis Powell.

Before Powell addressed the special admissions program, he resolved two preliminary issues. First, he agreed with the first set of four justices' conclusion that Title VI only banned discrimination also prohibited by the Equal Protection Clause.¹⁴⁷ Thus, his opinion resolved the issues of reservations and considerations of race in an individualized admissions process under both Title VI and the Equal Protection Clause. The second preliminary issue related to the controlling purpose of the Fourteenth Amendment. Powell noted that "the perception of racial and ethnic distinctions is rooted in" the nation's constitutional history.¹⁴⁸ Quoting from the *Slaughter-House Cases*, Powell candidly admitted that the "pervading purpose" of the Fourteenth Amendment was "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freedmen and citizen" from oppression.¹⁴⁹ According to Powell, however, post-Civil War judicial reaction "virtually strangled" this pervading purpose in its infancy and relegated it to decades of relative obscurity.¹⁵⁰ Between the time that the original purpose of the Fourteenth Amendment was strangled and new life was breathed into it, the country had become a "nation of minorities[,] each hav[ing] to struggle—and to some extent struggles still—to overcome the prejudices" of a majority.¹⁵¹ Powell went on to write:

It is far too late to argue that the guarantee of equal protection to *all* persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. . . . Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable.¹⁵²

Concluding that the guarantees of the Fourteenth Amendment must therefore extend to all persons, Powell asserted that the Equal Protection Clause could not mean one thing when applied to one race and something else when applied to another.¹⁵³

Powell, however, decided that under the First Amendment of the U.S. Constitution, public colleges and universities had a right of academic

145. *Id.* at 421.

146. *Id.* at 412.

147. *Id.* at 287.

148. 438 U.S. at 291.

149. *Id.*

150. *Id.*

151. *Id.* at 292.

152. *Id.* at 295.

153. 438 U.S. at 296-97.

freedom that allows them to determine their appropriate student body.¹⁵⁴ Thus, Bakke's assertion that any consideration of race violates his equal protection right must be weighed against the University's countervailing constitutional right to determine its own student body.

In balancing Bakke's equal protection rights with U.C. Davis's rights of academic freedom, Powell concluded that protecting the rights of individuals required the rejection of quotas that reserved a certain percentage of spaces for disadvantaged minorities.¹⁵⁵ However, if the purpose of considering race is to achieve the benefits that come from enrolling a diverse student body, then colleges and universities can use race as a plus factor in an individualized admissions process.¹⁵⁶ Powell was clear that the purpose of considering race is not to compensate disadvantaged minorities for past injustices, to recognize the present effects of those past injustices, or to take account of current injustices or under-representation.¹⁵⁷ Thus, while colleges and universities—public and private—could not reserve spaces for blacks, they could use race as a plus factor in an effort to obtain the benefits that flow from having a larger percentage of students from African-American and other ethnicities.

In the summer of 2003, the U.S. Supreme Court handed down two opinions dealing with the issue of affirmative action in higher education. In *Grutter v. Bollinger*, the Court upheld the University of Michigan Law School's affirmative action plan, permitting racial classifications to be included in an individualized admissions process as a means to pursue a critical mass of minority students from groups with a history of discrimination that would otherwise not be represented in significant numbers.¹⁵⁸ The Court, however, struck down an affirmative action admissions plan adopted by the University of Michigan's College of Literature, Science, and the Arts in *Gratz v. Bollinger* that determined admissions on a point-allocation system.¹⁵⁹ Applicants received points based on their academic performance including high school grade point average and standardized test scores.¹⁶⁰ They also received points based on certain characteristics including being a member of an under-represented minority group.¹⁶¹ The Supreme Court rejected the affirmative action plan presented in *Gratz* because it did not provide for the individualized and holistic consideration process that must be the core of a race-conscious admissions policy.¹⁶² However, instituting such an involved admissions process can substantially increase the administrative burden of institutions seeking to implement affirmative action policies.

In *Grutter*, Justice O'Connor wrote for the five person majority that strongly reaffirmed Justice Powell's 1978 opinion in *Bakke*.¹⁶³ As Justice

154. *Id.* at 312.

155. *Id.* at 289.

156. *Id.* at 317.

157. *Id.* at 307-10.

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

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

160. *Id.* at 255.

161. *Id.*

162. *Id.* at 271.

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

Powell did before her, O'Connor rested her opinion on a willingness to defer to the Law School's pedagogical judgment that "diversity is essential to its academic mission."¹⁶⁴ O'Connor noted that the benefits of enrolling a critical mass of underrepresented minority students with a history of discrimination are substantial:

[T]he Law School's admission policy promotes cross-racial understanding, helps to break down racial stereotypes, and enables students to better understand persons of different races. These benefits are important and laudable, because classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds.¹⁶⁵

Justice O'Connor notes that the University did not "premise its need for critical mass on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too [will] one's own, unique experience of being a racial minority in a society . . . [where] race unfortunately still matters" affect a person's views.¹⁶⁶

Justice O'Connor goes on to assert that the Law School's claim of a compelling interest is further bolstered by numerous expert studies and reports showing that student body diversity promotes learning and "better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals."¹⁶⁷ Justice O'Connor then notes additional benefits that flow from diverse student bodies not directly related to improvements in the academic environment. Major American businesses, who also filed an amicus brief in the case, made it clear that developing "the skills needed in today's increasingly global marketplace" requires "exposure to widely diverse people, cultures, ideas, and viewpoints."¹⁶⁸ Relying on a brief filed by high-ranking retired officers and civilian leaders of the military, Justice O'Connor noted that a "highly qualified, racially diverse officer corps is essential to the military's ability to fulfill its principle mission to provide national security."¹⁶⁹ At present, the military simply cannot achieve the twin goals of an officer corps that is both highly qualified and racially diverse without using limited race-conscious recruiting and admissions policies in the service academies and the ROTC.¹⁷⁰ Finally Justice O'Connor noted that "universities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders."¹⁷¹ She goes on to state:

In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly

164. *Id.* at 328.

165. *Id.* at 330 (quoting Appellant's Petition for Certiorari at 244a, 246a).

166. *Id.* at 333.

167. *Id.* at 330.

168. *Id.*

169. 539 U.S. at 331.

170. *Id.*

171. *Id.* at 333.

open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the education institutions that provide this training. . . . Access to legal education (and thus the legal profession) must be inclusive of talented and qualified individuals of every race and ethnicity.¹⁷²

C. *Anti-Discrimination Law and Publicly Funded HBCUs*

A key component of progress of African-Americans in anti-discrimination law and constitutional rights in education is the development of HBCUs. The pervasive segregation that African-Americans experienced before the 1950s left its mark on their access to higher education.¹⁷³ Blacks—and white supporters of their cause—worked within the constraints of segregation to create a parallel education system from primary school to higher education, the remnants of which continues to exist today. There are currently over 100 HBCUs located in 20 states, Washington D.C., and the Virgin Islands.¹⁷⁴ These include 41 public four-year, 11 public two-year, 49 private four-year, and 4 private 2-year institutions.¹⁷⁵ The

172. *Id.* at 332.

173. With the exception of two colleges chartered for free Blacks in Pennsylvania and Ohio, most Black colleges were founded in the South between the late 1860s and early 1900s. See Kitty Cunningham, *Are Black Public Colleges Turning White?*, BLACK ENTERPRISE, Aug. 1993, at 29.

174. President's Board of Advisors on Historically Black Colleges and Universities, *The Mission Continues: Annual Report to the President on the Results of Participation of Historically Black Colleges and Universities in Federal Programs*, U.S. Dep't of Educ., 41-43 app. F (2002-03), available at <http://www.ed.gov/about/inits/list/whhbcu/edlite-news.html>.

175. *Id.* An HBCU is any "college or university that was established prior to 1964, whose principal mission was, and is, the education of Black Americans." 20 U.S.C. § 1061(2) (2000). Six-year graduation rates of selected HBCUs compiled by Black Excel created from 2002 data presented in the US News & World Report "America's Best College" edition (2004) for all colleges is the following: Spelman College (GA) 76%; Claflin University (SC) 75%; Miles College (AL) 69%; Fisk University (TN) 62%; Lane College (TN) 61%; Morehouse College (GA) 58%; Voorhees College (SC) 56%; Tougaloo College (MS) 55%; Hampton University (VA) 53%; Howard University (DC) 53%; Xavier University of Louisiana (LA) 52%; Tuskegee University (AL) 51%; South Carolina State University (SC) 51%; Elizabeth City State University (NC) 51%; North Carolina Central University (NC) 46%; Winston-Salem State University 44%; Florida A&M University (FL) 43%; North Carolina A&T State University (NC) 43%; Johnson C. Smith University (NC) 41%; Lincoln University (PA) 40%; Morgan State University (MD) 39%; Bowie State University (MD) 38%; University of Maryland at Eastern Shore (MD) 37%; Virginia State University (VA) 36%; Dillard University (LA) 36%; Bowie State University (MD) 36%; Bennett College (NC) 36%; Jackson State University (MS) 35%; Bethune-Cookman (FL) 34%; Grambling State University (LA) 31%; Shaw University (NC) 31%; Prairie View A&M University (TX) 31%; Cheyney University of Pennsylvania (PA) 30%; Delaware State University (DE) 30%; Albany State University (GA) 28%; Clark Atlanta University (GA) 27%; Benedict College (SC) 27%; Coppin State University (MD) 24%; Norfolk State University (VA) 23%; Alabama State University (AL) 23%; Morris Brown College (GA) 23%; Central State University (OH) 22%; Virginia Union University (VA) 21%; and the University of the District of Columbia (DC) 20%. See Theodore Cross, *The Persisting Racial Gap in College Student Graduation Rates*, 45 J. BLACKS IN HIGHER EDUC. 77

majority of the states with HBCUs are in the South where the culture of segregation made segregated higher education mandatory before 1954.

These institutions have always been important for the education of black Americans. During the 1999-2000 academic year, some 24% of blacks who earned four year baccalaureate degrees received them at HBCUs.¹⁷⁶ They also matriculated about 24% of the blacks enrolled in four year programs.¹⁷⁷ HBCUs granted approximately one in six masters degrees and first-professional degrees earned by African-American men and women.¹⁷⁸ HBCUs historically accounted for the majority of black professionals. For example, by the early 1990s these institutions had produced almost

40[%] of America's black college graduates . . . [,] 80[%] of black federal judges, 85[%] of all black doctors, 75[%] of all black Ph.D.s., 50[%] of black engineers, and 46[%] of all black business professionals Moreover, historically black health-profession schools have trained an estimated 40[%] of black physicians, 75[%] of black veterinarians, 50[%] of black pharmacists, and 40[%] of the nation's black dentists.¹⁷⁹

These institutions are vestiges of segregation, but they are also symbols of self-help.

Though operation of private HBCUs is determined by the private sector, they are subject to Title VI of the 1964 Civil Rights Act, as are predominantly white institutions. As a result, HBCUs cannot discriminate against white students. However, banning whites from private HBCUs was seldom an issue. Cultural mores and prejudice kept whites from attending these institutions. Those same mores and prejudices continue to keep the percentage of whites choosing to attend private HBCUs relatively low and private HBCUs denying white students admissions because of their race is rarely a legal issue.

Since public HBCUs are products of government decision-making, their existence is the result of the political process.¹⁸⁰ When discussions about public HBCUs normally occur it is clear that they are sources of deep conflicts in the black community. On the one hand, there is the recognition that the creation and current shortcomings of these institutions is

(2004) (presenting tabulated graduation data for black students at HBCUs and PWIs for 2003).

176. White House Initiative on Historically Black Colleges and Universities, <http://www.ed.gov/about/inits/list/whhbcu/edlite-index.html> (last visited Mar. 30, 2008).

177. *Id.*

178. *Id.*

179. David H. Jackson, Jr., *Attracting and Retaining African-American Faculty at HBCUs*, 123 *EDUC.* 181, 182 (2002) (citations omitted); see also Alfreda A. Sellers Diamond, *Serving the Educational Interests of African American Students at Brown Plus Fifty: Historically Black College or University Affirmative Action Programs*, 78 *TUL. L. REV.* 1877, 1888-92 (2004) (discussing the historical importance of HBCUs).

180. Since public HBCUs are covered by the Equal Protection Clause and Title VI they cannot discriminate against whites in admissions.

due to the legacy of segregation and discrimination.¹⁸¹ These institutions are plagued by substandard infrastructures and dilapidated facilities and are perpetually dealing with financial difficulties.¹⁸² On the other hand, these institutions are responsible for training many highly educated black professionals and provide valuable assistance to the black community.¹⁸³

When the Supreme Court struck down segregation in public primary and secondary education in 1954, the southern states resisted. Rather than moving to desegregate higher education, these states continued their practice of the 1930s and 1940s of pouring money into black colleges. Segregation states sought to provide legitimate higher education alternatives

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181. See, e.g., Gerald A. Foster, *Are Black Colleges Needed?: An At-Risk/Prescriptive Guide* (1996); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW: AN AUTOBIOGRAPHY* 240 (1998) (arguing that public HBCUs should be closed or merged with predominately white institutions); see also Sean B. Seymore, *I'm Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?*, 12 WASH. & LEE J. C.R. & SOC. JUST. 287 (2006) (arguing that the Federal Government should withdraw financial support of HBCUs).
182. See CYNTHIA L. JACKSON & ELEANOR F. NUNN, *HISTORICALLY BLACK COLLEGES AND UNIVERSITIES: A REFERENCE HANDBOOK* 58–60 (2003) (discussing the historical development and current financial state of HBCUs). Also, at least ten HBCUs ceased operations since the mid 1970s. These institutions include Bishop College (Tex.), Mississippi Industrial College (Miss.), Daniel Payne College (Ala.), Lomax-Hannon Junior College (Ala.), Natchez Junior College (Miss.), Prentiss Institute (Miss.), and Mary Holmes College (Miss.). *Id.* at 59. See also Audrey Williams June, *Endangered Institutions: Morris Brown's Plight Reflects the Financial Troubles of Small, Poorly Financed Black Colleges*, CHRON. OF HIGHER EDUC., Jan. 17, 2003, at A24. It has been reported that the total endowment of the more than one hundred HBCUs combined is less than one-tenth of the endowment held by Harvard University. See *The News Hour with Jim Lehrer: Saving Black Colleges* (PBS television broadcast, Feb. 25, 2004) [hereinafter *Saving Black Colleges*], http://www.pbs.org/newshour/bb/education/jan-june04/college_02-25.html# (examining the financial crises at HBCUs).
183. See, e.g., ALBERT L. SAMUELS, *IS SEPARATE UNEQUAL? BLACK COLLEGES AND THE CHALLENGE TO DESEGREGATION* 68 (2004); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994). See also Arinola O. Adebayo, et al., *Historically Black Colleges and Universities (HBCUs) as Agents of Change for the Development of Minority Businesses*, 32 J. BLACK STUD. 166 (2001) (discussing the impact of HBCUs on black-owned businesses); Paulette V. Walker, *Black Colleges Help Revive Struggling Neighborhoods*, CHRON. OF HIGHER EDUC., June 13, 1997, at 22 (analyzing the increasing cooperation between HBCUs and disadvantaged communities in their areas); *Historically Black Medical Schools: Providing Critical Health Care, Training, and Research*, EBONY, Sept. 2003, at 88 (discussing the importance of historically black medical schools to health issues faced primarily by minorities and in black communities); *Tuskegee Helps State's Needy*, JET, Jun. 2, 2003, at 23 (listing the grants received by Tuskegee University to provide health services to the poor in Alabama). In medicine, there is a need for medical professionals who can appreciate how cultural and social factors of blacks contribute to the diseases that significantly affect the race, like HIV/AIDS, sickle-cell anemia, and diabetes. See JACKSON & NUNN, *supra* note 182, at 46. Professor Kenneth Tollett has listed seven different functions of HBCUs: (1) admirable models for success; (2) an environment which is "psychologically and socially congenial"; (3) an "enclave" for black students to transition from an isolated black world to white America; (4) protection against America's "declining interest in the education of blacks;" (5) societal resources for black communities; (6) a wider freedom of choice for black and white students; and (7) preserving black culture. Kenneth S. Tollett, Sr., *The Fate of Minority-Based Institutions After Fordice: An Essay*, 13 REV. LITIG. 447, 475–84 (1994).

to blacks in their own schools in order to maintain the system of segregated higher education. The rise of the black power movement of the 1960s was based around the assertion of black self-help and racial pride. Thus, by the time serious legal attention was brought to bear on the issue of the future of public HBCUs in the late 1960s, the black community was polarized around two radically different extremes. One extreme embraced the statement articulated by the Supreme Court in *Brown v. Board of Education* that "in the field of education, separate was inherently unequal."¹⁸⁴ The proponents of this extreme supported complete desegregation and believed that there was no role for public HBCUs. Appropriate solutions for public HBCUs were to attract significant numbers of white students, merge with the state's white colleges and universities, or simply close. Despite the decades of under funding and neglect, however, public HBCUs had their supporters. There were many who felt that HBCUs were a necessary aspect of the black self-help movement, because they provided blacks with the opportunity to shape their higher education experience.¹⁸⁵ In addition, many viewed HBCUs as a source of racial pride.¹⁸⁶ Others recognized that decades of inadequate primary and secondary education left too many blacks ill-prepared to attend the more academically rigorous white colleges and universities.¹⁸⁷ Black colleges, however, developed programs to address the inadequate preparation of many of their students. Regardless of the historic neglect that public HBCUs experienced, they would still provide a significant number of black students with their only viable option for higher education. To dismantle these institutions would actually reduce opportunities for African-Americans, rather than improve them.

Lower federal courts began to address the legal status of HBCUs as early as 1968.¹⁸⁸ But it wasn't until 1992 in *United States v. Fordice*¹⁸⁹ that the Supreme Court rendered its only major decision specifying the remedial obligation of the state with regard to public HBCUs. *Fordice* dealt with the higher education system operated by the State of Mississippi. By the time litigation leading to the Supreme Court's 1992 opinion commenced, Mississippi was operating eight universities: five for whites (the University of Mississippi, Mississippi State University, Mississippi University for Women, the University of Southern Mississippi and Delta State University)¹⁹⁰

184. *Brown*, 347 U.S. at 495.

185. See, e.g., SAMUELS, *supra* note 183, at 68-72.

186. *Id.*

187. See, e.g., Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1, 13-20 (1994) (describing minority unequal access to education).

188. See *Ala. State Teachers Ass'n v. Ala. Pub. Sch. & Coll. Auth.*, 289 F. Supp. 784 (M.D. Ala. 1968), *cert. denied*, 393 U.S. 4 (1969); *Norris v. State Council of Higher Ed.*, 327 F. Supp. 1368 (E.D. Va 1971) *cert. denied*, 404 U.S. 907 (1971); *Adams v. Richardson*, 356 F. Supp. 92 (D.C.D. 1973).

189. 505 U.S. 717 (1992).

190. Mississippi started its public university system in 1848 by founding the University of Mississippi. In the statute authorizing its creation, it was designated to serve only whites. Four more universities were created for whites: Mississippi State University was founded in 1880, Mississippi University for Women in 1885, the University of Southern Mississippi in 1912, and Delta State University in 1925. *Id.* at 721.

and three for blacks (Alcorn State, Jackson State University and Mississippi Valley State University).¹⁹¹ The State of Mississippi under-funded the black public universities for decades.¹⁹² In addition, the State circumscribed the mission of the black universities primarily to undergraduate training in teacher education, agricultural and mechanical professions, and vocational training.¹⁹³

It was not until 1962 that James Meredith, by enrolling at the University of Mississippi, broke the color barrier at any public Mississippi university.¹⁹⁴ When Meredith first sought to enroll in 1961, the governor of the state, the university officials and other governmental officials all worked to prevent it.¹⁹⁵ Meredith's registration in 1962 caused a full-scale riot at the University of Mississippi.¹⁹⁶ Two men were killed, hundreds were injured and nearly 200 people were arrested.¹⁹⁷ By 1967, however, all of the historically white colleges had begun admitting black students.¹⁹⁸ The first black college to enroll a white student, Alcorn State University, did so in 1966.¹⁹⁹ The other two followed suit in 1969 and 1970.²⁰⁰ While the black colleges in Mississippi began to hire white faculty members in the late 1960s, the first black faculty member was not hired at any of the white colleges until the 1970–71 academic year.²⁰¹ Mississippi State University, the last white college to hire a black faculty member, did not do so until 1974–75 school year.²⁰²

In 1975, a group of black petitioners, the "Ayers plaintiffs," filed a petition in federal court.²⁰³ Rather than seeking to desegregate the historically white institutions, the Ayers plaintiffs focused on the fact that Mississippi had systematically under-funded its black universities for decades.²⁰⁴ The aim of their complaint was to significantly strengthen the funding for, and the academic programs at, the historically black col-

191. Alcorn State was founded in 1871, Jackson State University, originally founded as a private college for the purpose of preparing black ministers and teachers, came under state control in 1940, and Mississippi Valley State University, which was originally called "Mississippi Vocational College" and had a mission of educating teachers primarily for rural and elementary school and providing vocational training for blacks, came under state control in 1950. *Id.* at 721–22.

192. For example, in the period of 1952–54, only 15.7% of the ten million dollars that the state spent on higher education was spent on black institutions. SAMUELS, *supra* note 183, at 97.

193. *Fordice*, 505 U.S. at 721–22.

194. University of Mississippi Libraries, Inventory of the James Howard Meredith Collection (MUM00293), http://www.olemiss.edu/depts/general_library/files/archives/collections/guides/latesthtml/MUM00293.html#a2 (last visited Mar. 30, 2008).

195. *Id.*

196. *Id.*

197. *Id.*

198. See Robert N. Davis, *The Quest for Equal Education in Mississippi: The Implications of United States v. Fordice*, 62 Miss. L.J. 405, 413 (1993).

199. *Id.*

200. See *id.*

201. *Id.*

202. *Id.*

203. *Fordice*, 505 U.S. at 723.

204. See SAMUELS, *supra* note 183, at 107.

leges.²⁰⁵ The Ayers plaintiffs agreed that blacks needed more access to historically white colleges.²⁰⁶ However, they also felt that in order to preserve the education opportunities for blacks, it was necessary to strengthen the black colleges.²⁰⁷ For the Ayers plaintiffs, the goal of litigation was not the merging of black colleges with white colleges that would lead to the elimination of HBCUs.²⁰⁸ Rather, they viewed the obligation of the State of Mississippi as requiring it to make sure that *all* of its publicly-supported universities offered students an equal chance at a quality education.²⁰⁹ As a result, Mississippi had to cure its decades of neglecting black universities by compensating them financially and significantly strengthening their academic programs.²¹⁰

Twelve years of negotiations failed to produce an agreement. In 1987 the case went to trial.²¹¹ During the 1985–86 academic year over 99% of the white students attended one of the historically white universities.²¹² During this same academic year, 71% of the black students attended HBCUs.²¹³ Since its universities no longer barred black students from attending white colleges or white students from attending black colleges, however, the State of Mississippi argued that its non-discrimination admissions policies satisfied its obligation to remedy its formerly segregated public higher education system.²¹⁴ The State asserted that the continued segregation of its public universities was no longer the result of state action, but the voluntary choices by individual students.²¹⁵ In sum, the State argued that its equal protection obligation to remedy its former unconstitutional maintenance of separate black and white universities only required that it implement non-discriminatory admissions and hiring practices.

The Supreme Court rejected the arguments by both the Ayers plaintiffs and the State of Mississippi, and concluded that even though the state enacted admissions and hiring policies that were race-neutral, that alone did not satisfy its remedial duty to desegregate its colleges and universities.²¹⁶ The Court held that the remedial obligation of a state that had formerly operated a segregated system of higher education does not discharge “its constitutional obligations until it eradicates policies and practices traceable to its prior *de jure* dual system that continue to foster segregation.”²¹⁷ The Court went on to state:

If the State perpetuates policies and practices traceable to its prior system that continue to have segregative effects—whether by in-

205. *Id.*

206. *Id.* at 110.

207. *Id.*

208. *Id.* at 107-08.

209. *Id.* at 107-10.

210. *Id.* at 109.

211. *Fordice*, 505 U.S. at 725.

212. *Id.* at 724.

213. *Id.* at 725.

214. *Id.*

215. *Id.*

216. *Id.* at 743.

217. 505 U.S. at 728.

fluencing student enrollment decisions or by fostering segregation in other facets of the university system—and such policies are without sound educational justification and can be practicably eliminated, the State has not satisfied its burden of proving that it has dismantled its prior system.²¹⁸

The Court noted that the former *de jure* segregated system of public universities impeded the free choice of prospective students.²¹⁹ Thus, the State of Mississippi is required to “take the necessary steps to ensure that this choice now is truly free.”²²⁰ It is with this duty in mind that the policies and practices instituted by the system of public universities in Mississippi must be examined.²²¹ Clearly, the maintenance by Mississippi of five white universities and three black ones is traceable to the prior system of education and has segregative effects. In addressing the question of the continued maintenance of public HBCUs, the Court stated:

If we understand private petitioners to press us to order the upgrading of Jackson State, Alcorn State, and Mississippi Valley State *solely* so that they may be publicly financed, exclusively black enclaves by private choice, we reject that request. The State provides these facilities for *all* its citizens and it has not met its burden under *Brown* to take affirmative steps to dismantle its prior *de jure* system when it perpetuates a separate, but ‘more equal’ one.²²²

The Court commented that maintaining all eight universities is “wasteful and irrational.”²²³ It noted the close proximity of Delta State University to Mississippi Valley (only 35 miles apart) and Mississippi State to Mississippi University for Women (20 miles apart).²²⁴ But the Court stopped short of ordering Mississippi to close any of its universities.²²⁵

The ultimate impact of *Fordice* on public HBCUs is still not clear. However, the opinion leads to certain definite constitutional conclusions. The Court clearly rejected the idea of strengthening public HBCUs as a means of increasing the educational opportunities of blacks, meaning that states that operated segregated higher education systems cannot be constitutionally compelled to substantially strengthen and upgrade their black public colleges. It is also clear that a Court will look suspiciously upon a public school operated as an “exclusively black enclave” of private choice.

D. Increasing Ethnic Diversity of Black Students Benefitting from Affirmative Action Programs

There is a growing diversity in the population of black students, which equates to a decline in the number of Ascendants on college campuses, especially at selective colleges, universities and graduate programs

218. *Id.* at 731–32.

219. *Id.* at 729.

220. *Id.* at 743.

221. *Id.*

222. *Id.*

223. 505 U.S. at 741.

224. *Id.* at 741–42.

225. *Id.* at 742–43.

that employ affirmative action admissions policies. This issue has been receiving increased attention of late. Harvard professors Dr. Henry Louis Gates Jr. and Lani Guinier pointed out during a black alumni gathering in 2003 that the children of African and Caribbean immigrants and children of biracial couples together comprised two-thirds of Harvard's Black undergraduate population.²²⁶ A year later an article by Ronald Roach in *Diverse Issues in Higher Education* pointed out that 41% of black freshmen at 28 selective schools identified themselves as immigrants, children of immigrants or mixed-race.²²⁷ Last year, Professor Angela Onwuachi Willig published an article on this topic in the *Vanderbilt Law Review*.²²⁸

Immigration of blacks from different parts of the world has drastically changed the makeup of the black student body on college and university campuses. This is a relatively recent phenomenon. According to the 2000 census, there were almost 21 million foreign-born blacks in the United States, constituting approximately 6.1% of the black population.²²⁹ Forty one percent of black immigrants entered the U.S. between 1990 and 2000;²³⁰ 32% entered between 1980 and 1989 and 27% before 1980.²³¹

Using U.S. Census Bureau statistics, one study of K-12 schools found that 3.5% of black students were born outside of the country and 13.6% had at least one parent born in a foreign country.²³² Both of these percentages are approximately twice the rate for whites.²³³ The percentage of blacks who are foreign-born rises significantly at the college and graduate school levels. "More than 15% of all black undergraduate students enrolled at U.S. colleges and universities were born in a foreign land. This is

226. Ronald Roach, *Drawing Upon the Diaspora*, DIVERSE ISSUES IN HIGHER EDUCATION, Aug. 25, 2005, http://www.diverseeducation.com/artman/publish/article_4558.shtml (last visited Dec. 10, 2007).

227. See *id.* The issue of racial classifications of students is complicated by the fact that colleges, universities and graduate program applications will vary in how students are allowed to identify themselves. The five traditional categories are African American/Black, Native American/Alaska Native, Asian American, Hispanic/Latino, and White. However, there could be variations. Some allow applicants to check one box, some allow them to check more than one box. In addition, there is a Common Application that was used by more than 250 colleges and universities for the class of 2006 which includes ten options. For further discussion of this issue, see Nancy Leong, *Multiracial Identity and Affirmative Action*, 12 UCLA ASIAN PAC. AM. L.J. 1, 6-8 (2006).

228. Angela Onwuachi-Willig, *The Admission of Legacy Blacks*, 60 VAND. L. REV. 1138, 1141 (2007).

229. This compares with 11.1% of the total U.S. population being foreign-born. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS SPECIAL REPORTS 7 fig.5 (2005), <http://www.census.gov/prod/2005pubs/censr-25.pdf>. For figures related to the number of foreign-born blacks, see *id.* at 7 fig.5. In 2000, 84% of all foreign-born Blacks were from two regions—the Caribbean (60%) and Africa (24%). *Id.* at 9. This compares with only 9% and 3%, respectively, of the total foreign-born U.S. population. *Id.* at 9.

230. *Id.* at 8 fig.6.

231. JESSE D. MCKINNON & CLAUDETTE E. BENNETT, WE THE PEOPLE: BLACKS IN THE UNITED STATES, CENSUS SPECIAL REPORTS 8 (2005), available at <http://www.census.gov/prod/2005pubs/censr-25.pdf>.

232. *A Solid Percentage of Black Students at U.S. Colleges and Universities are Foreign-born*, J. BLACKS IN HIGHER EDUC., Jan. 2006, at 11.

233. *Id.*

four times the rate for whites.”²³⁴ In 2003, 22.2% of black undergraduates had at least one parent born outside of the United States.²³⁵ “For enrolled black graduate students, 16.5%, or one of every six, were born outside the U.S.”²³⁶ This compares with only 7.6% for white students.²³⁷ And 22.8% of black graduate students had at least one foreign-born parent.²³⁸

Based on data from the 2000 census, black immigrants from Africa had the highest college graduation rates of any ethnic group in the United States. The college graduation rate for African immigrants was 43.8% compared to 42.5% for Asian Americans, 28.9% for immigrants from Europe, Russia and Canada and 23.1% for the U.S. population as a whole.²³⁹ In fact, the African immigrants’ education attainment levels of 14 years actually exceed those of whites and Asians who are at 12.9 and 13.1 years, respectively.²⁴⁰

The saturation of Black Immigrants when compared to native blacks on college campuses also exists among selective colleges and universities. A recent study using data from the National Longitudinal Survey of Freshmen, which is a nationwide survey of students who entered 28 selective colleges and universities in 1999,²⁴¹ examined the issue. The study noted that while only 13% of black 18- to 19-year-olds are first or second-generation immigrants, they made up 27% of the freshmen at 28 selective colleges and universities.²⁴² The percentage of first and second-generation black immigrants was actually higher at the ten most selective schools, constituting 35.6%.²⁴³ It was also higher at four of the Ivy League schools (Columbia, Princeton, Penn and Yale) where they made up 40.6% of the black students enrolled.²⁴⁴ As Professor Guinier wrote in a *Boston Globe* column, “[l]ike their wealthier White counterparts, many first- and second-generation immigrants of color test well because they retain a national identity free of America’s racial caste system and enjoy material and cultural advantages, including professional or well-educated parents.”²⁴⁵

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. See Clarence Page, *Black Immigrants Collect Most Degrees, But Affirmative Action is Losing Direction*, CHI. TRIB., Mar. 18, 2007, at 7.

240. *Id.*

241. Douglas S. Massey, et al., *Black Immigrants and Black Natives Attending Selective Colleges and Universities in the United States*, 113 AM. J. ED. 243, 248 (2007). All of the 28 schools are selective in the sense that only a subset of those who apply are selected. The least selective of the institutions was Miami University of Ohio with a 79% acceptance rate and the most selective was Princeton with an 11% acceptance rate.

242. *Id.* at 245. In contrasting first and second generations, Asians and Latinos constituted 97% and 73% of the freshmen. But these percentages more closely approximate the percentage of 18- and 19-year-olds who are also first or second generation immigrants, 91% and 66%, respectively.

243. *Id.* at 248 tbl.1.

244. *Id.*

245. Roach, *supra* note 226.

In addition to the increasing representation of Black Immigrants, there is evidence that Black Biracial students are also increasing in numbers. Societal acceptance of interracial marriages, as well as the number of interracial marriages, has increased significantly over the past 50 years in the United States. As late as 1965, 48% of whites in a national poll indicated approval of anti-miscegenation laws.²⁴⁶ In the South, the feeling was even stronger with 72% of whites and 30% of blacks approved of such laws.²⁴⁷ However, in a 1997 Gallup poll, 77% of blacks and 61% of whites approved of interracial marriages.²⁴⁸

Except for whites, blacks are less likely to marry outside of their race than any other group in the U.S.²⁴⁹ According to the calculations of Douglas Besharov and Timothy Sullivan, in 1960 about 1.7% of married blacks had a white spouse.²⁵⁰ In 1990, the percentage had risen to about 8.3% for

246. ROBERT J. SICKELS, *RACE, MARRIAGE AND THE LAW* 117, 121 (1972).

247. *Id.*

248. See Maria Root, *The Color Of Love*, AMERICAN PROSPECT, Apr. 8, 2002, at 54 (Contrastingly, in 1990, a National Opinion Research Center poll asked how certain groups would feel about a close relative marrying someone from outside their racial or ethnic group and 57.5% of blacks were strongly opposed.); see also Stephen Thernstrom & Abigail Thernstrom, *We Have Overcome*, NEW REPUBLIC, Oct. 13, 1997, at 23 (stating that the proportion of whites who would like to see interracial marriage outlawed has dropped from 62 to 16%); Walter C. Farrell, Jr. & James H. Johnson, Jr., *Minority Political Participation in the New Millennium: the New Demographics and the Voting Rights Act*, 79 N.C. L. REV. 1215, 1222 (2001) (quoting Lawrence Bobo, et. al., *Public Opinion Before and After the Spring of Discontent*, in THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 117, 119 (Mark Baldassare ed., 1995). When examining preference patterns regarding intermarriage, responses are somewhat similar. Consistent with the previous findings, the strongest opposition is to intermarriage involving Blacks. "Nearly one-third of White and Asian respondents and approximately 25% of Hispanics objected to an interracial marriage with an African-American."). See also Isabel Wilkerson, *Black-White Marriages Rise, but Couples Still Face Scorn*, N.Y. TIMES, Dec. 2, 1991, at A1 (referencing polls suggesting that as much as 20% of whites continue to believe that interracial marriage should be illegal). Another survey of American attitudes showed that in 1997 67% of whites and 83% of African-Americans approved of interracial marriages. See HOWARD SCHMAN, CHARLOTTE STEEH, LAWRENCE BOBO & MARIA KRYSAN, *RACIAL ATTITUDES IN AMERICA: TRENDS AND INTERPRETATIONS* (1997). Blacks are consistently rated as the least desirable spouses for children by Asians, Latinos and Whites. See Vincent Kang Fu, *How Many Melting Pots? Intermarriage, Pan ethnicity, and the Black/Non-Black Divide in the United States*, 38 J. COMP. FAM. STUDIES 215, 215 (2007).

249. The percentage of single race American Indian men in interracial marriages or cohabitations in 2000 was reported at 57.4% and 40.3% respectively, for Asian American men 45.8% and 53.7% respectively, for Hispanic men 31.9% and 38.9% respectively. For single race American Indian women, the percentage in interracial marriages or cohabitations in 2000 was 58.5% and 41.5% respectively, Asian Americans 59.6% and 66.3% respectively, and for Hispanics 30.7% and 36% respectively. See Zhenchao Qian & Daniel T. Lichter, *Social Boundaries and Marital Assimilation: Interpreting Trends in Racial and Ethnic Intermarriage*, 72 AMER. SOC. REV. 68, 79 (2007). See also Vincent Kang Fu, *How Many Melting Pots? Intermarriage, Pan ethnicity, and the Black/Non-Black Divide in the United States*, 38 J. COMP. FAM. STUD. 215, 218 (2007) ("Blacks are consistently rated as the least desirable spouses for children of Asians, Latinos, and Whites.").

250. Douglas J. Besharov & Timothy S. Sullivan, *One Flesh*, NEW DEMOCRAT, July-Aug. 1996, at 19.

men and 3.3% for women.²⁵¹ In the 2000 census, 9.7% of black men and 4.1% of black women who were married were in interracial marriages.²⁵² A recent study of census data from 1990 and 2000 of married couples between the ages of 20 and 34 indicates even higher rates of interracial marriages among younger blacks.²⁵³ Native-born African-Americans experienced increases in interracial marriages as well as interracial cohabitation²⁵⁴ between the 1990 and 2000 census. The calculation of interracial marriage and interracial cohabitation is complicated by the fact that in the 1990 census individuals were only allowed to identify themselves in a single race category, but in the 2000 census they were able to check all racial categories that applied to them. Thus, in the 1990 census the native-born black category included those who in the 2000 census self-identified as both single race blacks and multiracial blacks. Interracial marriages increased for both groups of blacks between 1990 and 2000. The percentage of native-born black men who had married outside of their race increased from the 1990 figure of 8.3% to 14.2% for single-race black men and to 14.9% for multiracial black/white men.²⁵⁵ For native-born black women, the 1990 figure of 3.3% increased to 5.0% for single-race black women and 5.3% for multiracial black/white women.²⁵⁶

The 18 year-old college freshmen who enrolled in college this past fall would have been born in 1989. Since then, the percentage of interracial marriages and cohabitation by blacks has increased significantly. The percentage of Black Biracial college students is likely to continue to increase for the near future, especially at selective colleges, universities and graduate programs. Further evidence of this probability comes from the fact that according to the 2000 census the average age of mixed-race blacks is

251. See, e.g., Qian & Lichter, *supra* note 249, at 79.

252. See Sharon M. Lee & Barry Edmonstron, *New Marriages, New Families: U.S. Racial and Hispanic Intermarriages*, POPULATION BULLETIN, June 2005, at 12. It should also be noted that black immigrants and their children are slightly more likely to marry outside of their race than third generation blacks. The interracial marriage rates of first generation blacks is 14%, compared to 12% for second generation and 10% for third generation and higher. See Barry Edmonstron, et. al., *Recent Trends in Intermarriage and Immigration and their Effects on the Future of Racial Composition of the U.S. Population*, in THE NEW RACE QUESTION: HOW THE CENSUS COUNTS MULTIRACIAL INDIVIDUALS 241 (Joel Perlmann & Mary C. Watrees eds. 2002).

253. See, e.g., Qian & Lichter, *supra* note 249, at 79.

254. While many individuals will get married, an alternative to marriage is cohabitation, a short term marriage-like arrangement. It has contributed to a reduction in marriage rates in early adulthood and an increase in the average age of first marriage. The study also saw similar increases in the percentage of blacks involved in interracial cohabitation arrangements. The authors stated that the percentage of African-American males in interracial cohabitation arrangements increased from 14.9% to 21.9% between 1990 and 2000. For black women the increase was more modest, from 5.3% to 6.2%. See *id.*

255. See Qian & Lichter, *supra* note 249, at 79.

256. *Id.* The percentage of native-born African-American men who identified as multiracial white who were in interracial marriages was 14.9% and the percentage of those who identified as multiracial minority who were in interracial marriages was 15.4%. *Id.*

only 16.3 years compared to black alone at 30.4 years.²⁵⁷ Where mixed-race blacks constitute 8.4% of blacks under the age of 18, they are only 3.7% of those between the ages of 18 and 64 and only 2% of those aged 65 and older.²⁵⁸

Black Biracials also seem to be better educated than Ascendants. The percentage of the black population over the age of 25 that has attained some college or associate degree is 28.4%, compared to 33.3% for black biracials.²⁵⁹ Whereas 14.3% of the black population over the age of 25 have obtained a college degree, 20.6% of mixed-race blacks have done so.²⁶⁰ Thus, they are 44% more likely to have a college degree. Black Bi-racial children who self-identify as white also have higher test scores than those who identify as black.²⁶¹

III. IMPACTS OF CONSTITUTIONAL LAW AND FEDERAL ANTI-DISCRIMINATION LAW ON DALITS IN HIGHER EDUCATION IN INDIA

Only two of the four aspects discussed in the previous section in applying federal anti-discrimination law and constitutional law to higher education of African-Americans apply to the discussion of Dalits. First, as with blacks in the U.S., Dalits have constitutional protections against formal discrimination in admissions by public colleges and universities. Federal legislation also prevents formal discrimination by private colleges and universities in India against Dalits. Blacks have similar protections against private colleges and universities under federal discrimination law as the result of Title VI of the 1964 Civil Rights Act. Second, while affirmative action is applied to both groups, the concept of "affirmative action" functions very differently in India than it does in the U.S. Contrary to affirmative action in the U.S., in India, affirmative action requires public colleges and universities to reserve admissions seats for Dalits. Until recently, private colleges and universities were also required to reserve admissions seats for Dalits. However, a recent decision by the Indian Supreme Court has placed this requirement in a state of flux.

The other two aspects of anti-discrimination law as applied to African-Americans are generally not significant legal issues in the context of Dalits. Dalits never experienced an era comparable to the post-Civil War segregation era in the U.S., and lack institutions where they were the exclusive (or majority) race, comparable to HBCUs. Finally, there is no real diversity within the Dalit group like the varied make-up of black students in the U.S. Continued disapproval of inter-caste marriages, espe-

257. Jesse D. McKinnon & Claudette E. Bennett, *We the People: Blacks in the United States*, CENSUS SPECIAL REPORTS, Aug. 2005, at 17 tbl.2, available at <http://www.census.gov/prod/2005pubs/censr-25.pdf> (last visited Feb. 16, 2007).

258. *Id.*

259. *Id.*

260. *Id.* at 17 fig.6.

261. Melissa R. Herman, *The Black-White-Other Test Score Gap: Academic Achievement Among Mixed-Race Adolescents* 26 (Nw. Univ. Inst. For Policy Research, Working Paper No. IPR-WP-02-31, 2002). Herman also found that mixed race students of black and Asian descent do better in school than monoracial blacks, but not as well as Asians. *Id.* at 24.

cially with Dalits, keeps the number of mixed-caste Dalit children relatively small.²⁶² In these limited cases, the general rule is that a child with a Dalit father and non-Dalit mother is to be categorized as Dalit. A child with a Dalit mother and a non-Dalit father is not Dalit. However, this is a general rule and a lot of discretion is given to local governmental officials who categorize citizens. If an official decides that the child has been accepted in the Scheduled Caste community, and has been brought up in the surroundings of that community, then he may be treated by the government and the courts as Scheduled Caste.²⁶³

A. *Development of Non-discrimination Policies to Protect Dalits in Colleges and Universities*

Article 15(1) and Article 16(1) of the Indian Constitution prevent any kind of discrimination against Dalits.²⁶⁴ Further, Article 28(2) of the Indian Constitution specifically prevents any discrimination based on caste (amongst other factors) in public education admissions.²⁶⁵ These constitutional provisions protecting Dalits do not apply to private colleges, but there are several pieces of federal legislation that make any discrimination against Dalits by private individuals or entities a criminal offence. For instance, The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 details a variety of discriminatory offences against Dalits that are punishable under law.²⁶⁶ Thus, Dalits have federal legal protection against discrimination in admissions by private colleges and universities.

262. See Chu, *supra* note 78 (referring to a survey last year by the New Delhi-based Center for the Study of Developing Societies, reasoning that 74% of Indians thought inter-caste marriages were unacceptable).

263. Ministry of Home Affairs Memorandum to State 1977, cited in LAURA DUDLEY JENKINS, *IDENTITY AND IDENTIFICATION IN INDIA: DEFINING THE DISADVANTAGED* 78 (2003); see also Anjan Kumar v. Union of India (Civil Appeal No.6445 of 2000); but see <http://judis.nic.in/supremecourt/qrydisp.asp?tfnm=27481> (Indian Supreme Court, 2000) (holding that a mixed-caste child born to parents outside the village, and brought up in urban India, was not brought up in a Scheduled Caste community, and therefore was not Dalit for the purposes of affirmative action).

264. INDIA CONST. art. 16, cl. 1 ("There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.").

265. "No citizen shall be denied admission into any education institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them." INDIA CONST. art. 28, cl. 2.

266. Section 3 details the list of punishable atrocities. It is very broad in its sweep. Even a suggestion of discrimination against Dalits (for instance, an innuendo, or derisive comment) is punishable with a jail sentence. While this legislation does not specifically deal with public education, it is at times used in that context by students who feel discrimination. There are several other laws which prevent discrimination against Dalits. The Protection of Civil Rights Act (1955) prevents any denial of access to professions, public spaces, educational institutions on the grounds of untouchability. The Bonded Labour System (Abolition) Act (1976) and The Child Labour (Prohibition and Regulation) Act (1986) aim to address discrimination against Dalits in their historic professions.

B. Reservations for Dalits in Higher Education

Before delving into affirmative action for Dalits in higher education, some data on higher education in India is useful in contextualizing the debate. India currently has over 15,000 colleges and almost 10 million students.²⁶⁷ The total number of undergraduate students in India is 7.85 million per year,²⁶⁸ which is 6-7% of the population in that age group.²⁶⁹ "There has been a rapid expansion in higher education, with student enrollment growing at about 5[%] annually over the past two decades. This growth is about two-and-half times the population growth rate, and results from both a population bulge in lower age cohorts [and] increased demand for higher education."²⁷⁰ "Recent growth is much greater in professional colleges (especially engineering, management and medicine), as well as in private vocational courses catering especially to the [information technology] sector."²⁷¹ The southern and western states of India have higher enrollment rates than the eastern states.²⁷²

There are three types of higher education institutions in India: public institutions, private (or unaided) institutions and minority institutions. Different legal provisions concerning reservations for Dalits apply to each of them. This section will discuss the different legal rules that apply to each of these types of higher education institutions.

1. Public Institutions

Public institutions of higher education are those that are partly or fully funded by the government. While there are universities that are partially funded by the government, there are only 221 government-run universities in India.²⁷³ Eighteen of these universities are operated by the central education institutions²⁷⁴ and the remaining 203 are state government education institutions.²⁷⁵ Public institutions reserve 15% of their admissions seats for Dalits.²⁷⁶ However, a few of these public institutions are designated 'Institutes of National Importance,' which must reserve 15% of their seats for Dalits, but do not need to accommodate Dalits by allowing lower scores on entrance examinations.²⁷⁷ As a result, many of the seats in these

267. Devesh Kapur & Pratap Bhanu Mehta, *Indian Higher Education Reform: From Half-Baked Socialism to Half-Baked Capitalism* 4 (Harvard Ctr. for Int'l Dev., Working Paper No. 108, 2004), available at <http://www.cid.harvard.edu/cidwp/pdf/108.pdf>.

268. Education in India: Past, Present, and the Future: Ideas, Policies, and Initiatives, "Lok Sabha: Unstarred Question no. 221," Dec. 12, 2004, <http://prayatna.typepad.com/education/datastatistics/index.html> (last viewed Oct. 19, 2006).

269. *Id.*

270. Kapur & Mehta, *supra* note 267, at 4.

271. *Id.*

272. *Id.*

273. See Government of India Department of Higher Education website, <http://education.nic.in/higedu.asp#C%20E%20N%20T%20R%20A%20L%20%20%20U%20N%20I%20V%20E%20R%20S%20I%20T%20I%20E%20S> (last visited July 27, 2007).

274. *See id.*

275. *See id.*

276. Sector Overview of the Department of Higher Education, Government of India, <http://www.education.nic.in/sector.asp> (last visited Mar. 22, 2008).

277. *See, e.g., Dalits and BCs Suffer Under Brahminical Dictatorship in IIT- Madras*, OOMAI, May 18, 2006, available at <http://oomai.wordpress.com/2006/05/18/dalits-bcs-suf->

institutions which are reserved for Dalits are not filled. There also is no obligation to appoint Dalits to faculty positions.²⁷⁸

The reservation percentage is based upon the percentage of Dalits in India according to the 1932 caste census. Recent census figures put the current percentage of Dalits at 16.5%.²⁷⁹ The rationale behind linking the percentage of reservations in public higher education institutions to the national percentage of Dalits in the Indian population derives from the pre-independence era when reservations were initially conceptualized. Originally, reservations were used to assure adequate representation in the legislature. The Indian government considered reservations in higher education a logical extension of the concept of reservations in the political process.

It is one thing to reserve seats at public colleges and universities for Dalits, but it is another to assure that they occupy those reserved seats. Whether Dalits actually occupy these reserved seats is difficult to determine. The government has compiled no countrywide statistics for higher education. Evidence collected from specific universities suggests that the number of reserved seats filled may only be about 50%.²⁸⁰ Since this data is only from a few universities, it would be hazardous to extrapolate that percentage to all Indian universities with reservations. A further issue is the number of Dalits who graduate. In contrast to the U.S., where college graduation statistics are readily available, reliable data (from the government or from private sources) on graduation rates in India is not available.

2. *Private Institutions*

Data on the total number of private institutions in India is unavailable. There is some data demonstrating substantial growth of private institutions in certain fields. For example, it is reported that the percentage of seats in engineering in private universities rose from 15% in 1960 to 86.4% currently.²⁸¹ In medical colleges, the proportion of private seats has risen from 6.8% of the total in 1960 to 40.9% in 2003.²⁸² There are estimates that 90% of the business schools are private education institutions.²⁸³

fer-under-brahminical-dictatorship-in-iit-madras/ (last visited Feb. 16, 2008); Dalit Media Network, *Dalits at the Indian Institutes of Technology*, PUCL Bulletin, available at <http://www.pucl.org/reports/National/2001/dalits.htm> (last visited Feb. 16, 2008).

278. See, e.g., *id.*

279. 1991 Census of India, Scheduled Tribes and Scheduled Castes Population, available at http://www.censusindia.gov.in/Census_Data_2001/India_at_Glance/scst.aspx (last visited Feb. 16, 2008).

280. See *Decision on Quota Is Final: Arjun*, IBN LIVE (May 21, 2006), available at <http://www.ibnlive.com/news/decision-on-quota-is-final-arjun/11063-4-single.html> (last visited Mar. 11, 2008). The Parliamentary Committee on the welfare for the Scheduled Castes and Scheduled Tribes, looking at the Delhi University between 1995 and 2000, notes that half the seats for undergraduates at the Scheduled Castes level were filled. This question was posed to the Minister for Human Resource Development, Arjun Singh, by a television interviewer. *Id.*

281. Kapur & Mehta, *supra* note 267, at 6.

282. *Id.*

283. *Id.*

In India, there are four types of private institutions for higher education. These institutions may receive partial or no funding from the government. The first type is universities set up by private individuals or organizations, through the central government's University Grants Commission (UGC).²⁸⁴ The second are those recognized by a 'state' (as opposed to federal) legislature.²⁸⁵ For instance, the Karnataka state legislature can pass legislation recognizing a private education institution as a university.²⁸⁶ This is a recently created category and UGC approval is not required. The third category consists of private colleges operating under a government university. Only a university can grant a "recognized degree" in India. In order for these types of universities—which are legally termed "unaided private education institutions"—to grant degrees, they must affiliate with a state-operated government university. The private college students who attend these institutions must follow the university schedule and take the university examination. All colleges under the same university have to adhere to the standardized course pattern followed by the university. Unlike in the U.S., the same university can have a variety of colleges (set up for different reasons, by different people or communities) under it. These three types of institutions can all confer degrees.

In the 2002 decision of the Indian Supreme Court in *TMA Pai Foundation v. State of Karnataka*, the Court elaborated on rights of citizens under Article 19 (1)(g) of the Indian Constitution, which confers a fundamental right upon all citizens to "practice any profession, or to carry on any occupation, trade or business."²⁸⁷ This case was decided by 11 judges, the second largest bench strength ever in Indian constitutional history.²⁸⁸ This case addressed a large number of issues regarding higher education in India. Its holding on minority education institutions is dealt with in the next sub-section of this Article. However, with regard to private institutions, the Court stressed the "essentially charitable nature" of providing education, which rules out education as a business.²⁸⁹ A six-to-five major-

284. See AMRIK SINGH, FIFTY YEARS OF HIGHER EDUCATION IN INDIA: THE ROLE OF THE UNIVERSITY GRANTS COMMISSION (2004).

285. *Yashpal v. State of Chattisgarh*, (2005) 2 S.C.C. 61 (India Supreme Court, 2005), held that executive action could not create private universities; they may only be created by states through legislation.

286. See, e.g., The creation of National Law School of India University (NLSIU) by state legislation at the NLSIU Homepage, http://www.nls.ac.in/about_history.html (last visited Mar. 22, 2008).

287. (2002) 8 S.C.C. 481 (India Supreme Court, 2002).

288. In India, the phrase 'bench strength' refers to the number of judges that are hearing or have heard a particular case. This is decided by the Chief Justice of a particular court. This 'bench strength' is important because it indicates the relative ability of the judges in that case to overturn previously decided law. Decisions made by a particular 'bench strength' can be overturned only by a higher bench strength, and is binding on a lower bench strength. Therefore, when the Chief Justice of India allocates a certain number of judges to hear a case (the 'bench strength'), it indicates what he thinks the Court should be doing in that case. If the number of judges that he allocates to a case is higher than the 'bench strength' of the previous case which involved similar facts, it means that he expects the previous decision to be definitely reconsidered, and perhaps even overturned.

289. (2002) 8 S.C.C. 481 (India Supreme Court, 2002).

ity of the Court concluded, however, that the provision of education is a legitimate "occupation."²⁹⁰

In 2005 in the case of *P.A. Inamdar v. State of Maharashtra*,²⁹¹ the Supreme Court relied upon the implications of the *TMA Pai Foundation* opinion to hold that the constitutionally guaranteed fundamental right of private higher education found in Article 19 (1)(g) meant that the government could not exercise control over private institutions without clear legislative authority.²⁹² With this decision, the government lost control of half the seats in private colleges and the corresponding reservations for Dalits included in these seats.

Within months Parliament passed the 93rd Constitutional Amendment that introduced Article 15(5).²⁹³ This amendment gives state and federal governments the power to establish reservations for Schedule Castes and Scheduled Tribes in non-minority private education institutions, including colleges and universities.²⁹⁴ However, the amendment is not self-executing. State and federal governments must enact legislation in order to reestablish reservations in private institutions. While the central government has introduced a bill for reservations in private institutions of higher education titled "Private Professional Education Institutions Bill, 2005" in Parliament, it has not been voted upon. Thus, as of today, there are no reservations in private higher education institutions in India.

Another development related to Article 15(5) threatens the future possibility of any governmental legislative body to enact a provision requiring reservations in private institutions. Using its powers under Article 15(5), in December 2006, Parliament passed a law to ensure 27% reservations for OBCs in central government education institutions.²⁹⁵ These central government higher education institutions already had reservations for Dalits and Scheduled Tribes of up to 22.5% of all seats.²⁹⁶ While reservations for OBCs exist in other areas,²⁹⁷ they had not included central gov-

290. *Id.*

291. (2004) 8 S.C.C. 139 (India Supreme Court, 2004).

292. *Id.* INDIA CONST. art. 19, cl. 1 reads "All citizens shall have the right . . . to practise [sic] any profession, or to carry on any occupation, trade or business."

293. The 93rd Constitutional Amendment Act s.2 reads, "Amendment of article 15.-In article 15 of the Constitution, after clause (4), the following clause shall be inserted, namely:- (5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally [sic] backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to education institutions including private education institutions, whether aided or unaided by the State, other than the minority education institutions referred to in clause (1) of article 30."

294. It also provides for the first time for reservations for OBCs. *Id.*

295. Central Education Institutions Act (2007). The Supreme Court stayed the enforcement of this legislation on the grounds that inadequate data exists on the categorization of OBCs. The stay was granted by an interim order in *Ashoka Kumar Thakur v. Union of India*, 2007 (5) S.C.A.L.E. 179 (India Supreme Court, 2007). The case was referred to a higher bench.

296. Sector Overview of the Department of Higher Education, Government of India, <http://www.education.nic.in/sector.asp> (last visited Mar. 22, 2008).

297. Reservations for OBCs have existed in state government employment and state education since the 1960s, but this has been confined to only *some* states. See Christophe

ernment higher education institutions. The extension of additional reservations to OBCs created a huge controversy in India. The Supreme Court stayed the enforcement of this legislation because inadequate data existed on the categorization of OBCs.²⁹⁸ The Supreme Court specifically exempted any provision benefiting Dalits (and tribals) from the ambit of its stay.²⁹⁹ In the stay, the Court referred the case to a higher bench.³⁰⁰ This by itself does not have any impact on Dalits. However, the higher bench that is currently hearing the matter included within its considerations the issue of whether there can be reservations in private colleges at all.³⁰¹ This is of great concern to Dalits, as well as OBCs and Scheduled Tribes. If the Indian Supreme Court strikes down article 15(5), not only will the gov-

Jaffrelot, The politics of OBCs, <http://www.india-seminar.com/2005/549/549%20christophe%20jaffrelot.htm> (last visited Mar. 22, 2008). Also, the subcastes termed as OBC significantly vary from state to state. In 1990, the V.P. Singh government issued an executive notification accepting the Mandal Report (see discussion of the Mandal Report in *supra* note 117, which recommended the establishment of reservations of 27% of seats for OBCs in central government jobs). This was on top of the 22.5% reservations that existed for Scheduled Castes and Scheduled Tribes. The decision by the Singh government was challenged. The Indian Supreme Court addressed a number of issues related to the extension of reservations to OBCs in government employment, including upholding the 27% reservations for OBCs. *Indra Sawhney v. Union of India*, A.I.R. 1993 S.C. 447 (India Supreme Court, 1993). Among other things, the petitioners challenging the implementation of the Mandal Report in the *Indra Sawhney* decision argued that some members of the designated OBCs were highly advanced socially, economically, and educationally. *Indira Sawhney v. Union of India*, A.I.R. 1993 S.C. 477. They argued that these highly advanced members, the "creamy layer," constituted the forward section of that particular backward class. *Id.* If they were allowed to benefit from reservations, they would garner almost all the benefits of reservation meant for that class, without allowing the benefits to reach the truly backward members of that class. Accepting this argument by the petitioners, the Court concluded that the economically well-off layer in any traditionally deprived community or group should be excluded from reservations. *Id.* Thus, the "Creamy Layer Exclusion" means that those OBCs who are economically well-off are barred from benefiting from reservations. The Court in the *Indra Sawhney* case directed the Government of India to develop criteria to use to determine the creamy layer. *Id.* Persons falling within the net of the exclusionary rule would cease to be OBCs (covered by the expression 'backward class of citizens') for the purpose of Article 16(4).

The Indian Supreme Court specifically stated in the *Indra Sawhney* opinion that the Creamy Layer Exclusion did not apply to Dalits. *Id.* The connecting link for Dalits is not social backwardness, but untouchability. There may be "socially advanced" persons among Dalits, but they cannot be excluded from the protected group because they continue to suffer from the vice of untouchability. OBCs, however, have to be recognized as a characteristic distinct from that of mere social backwardness. There is a remote possibility that the Creamy Layer Exclusion, which applies to OBCs, might be applied to Dalits in the future. See *M. Nagaraj and Others v. Union of India and Others* (8) S.C.C. 212 (India Supreme Court, 2006). But for now it appears unlikely. Venkatesan, *Ambiguous Verdict*, FRONTLINE, available at <http://www.hinduonnet.com/fline/fl2322/stories/20061117007203200.htm> (last visited Feb. 16, 2008).

298. The stay was granted by an interim order in *Ashoka Kumar Thakur v. Union of India*, 2007 (5) S.C.A.L.E. 179 (India Supreme Court, 2007).

299. *Ashoka Kumar Thakur v. Union of India*, 2007 (5) S.C.A.L.E. 179 (India Supreme Court, 2007).

300. *Id.*

301. *Id.*

ernment lose the ability to enact reservations in central education institutions for OBCs, they will also lose their ability to enact any kind of reservations in private colleges. This will have an enormous impact on Dalits because it will eliminate the ability to compel reservations by private colleges. Its importance cannot be exaggerated. As of March 12, 2008, the case has been argued before the Supreme Court, but not yet decided.

The fourth type of private higher education institution is composed of institutions void of any kind of government control. These institutions are not given the power to issue degrees, but instead are limited to issuing diplomas. Diplomas (unlike degrees) have no legal standing. They are merely certificates given by private entities and are not recognized by the government. The value of a diploma is purely based on the reputation of the diploma-granting institution. There are a few such institutions whose diplomas are considered valuable, especially in computer science education. Companies in India will accept diplomas from graduates of these institutions when looking for qualified applicants.³⁰² Reservations do not apply to these education institutions.

3. *Minority Education Institutions*

Article 30(1) of the Indian Constitution allows religious and linguistic minorities to establish education institutions of their choice.³⁰³ These institutions enjoy a vast degree of autonomy from the government. They can conduct their own courses, determine which students they admit, and control their administration, even if the government funds the institution.³⁰⁴ The purpose of Article 30(1) was to placate religious and linguistic groups who sought reservations for themselves. The framers of the Constitution were reluctant to reserve seats for different religious groups, believing that it would create a divided India.³⁰⁵ In order to placate these groups, they were given the right to form education institutions free from government interference in which they could educate their own, and propagate their unique identity.

In 2002, the Indian Supreme Court in the *TMA Pai Foundation* case held that privately-funded minority institutions did not have any obligations toward the government and consequently there would be no reservations in any minority institution.³⁰⁶ This was a result of an

302. For example, the Indian Institute of Planning and Management (IIPM) offers "industry recognized" management diplomas, and helps make up for the huge shortfall in management graduates in India. See the IIPM Homepage, <http://www.iipm.edu/iipm-old/admission-application-details.html> (last visited Mar. 31, 2008).

303. "All minorities, whether based on religion or language, shall have the right to establish and administer education institutions of their choice." INDIA CONST. art. 30, cl. 1.

304. *T.M.A. Pai Foundation v. State of Karnataka*, (2002) 8 S.C.C. 481 (India Supreme Court, 2002).

305. Zoya Hassan, *Reservations for Muslims*, REDRESSING DISADVANTAGES: A SYMPOSIUM ON RESERVATIONS AND THE PRIVATE SECTOR 549 (2005), available at <http://www.india-seminar.com/2005/549/549%20zoya%20hassan.htm>.

306. (2002) 8 S.C.C. 481 (India Supreme Court, 2002).

interpretation of Article 30(1) of the Indian Constitution, which provides for special rights for “minority education institutions.”³⁰⁷

IV. LESSONS LEARNED

There are five principal lessons we want to highlight from this comparison of the application of constitutional and federal discrimination laws to higher education opportunities of African-Americans in the U.S. with Dalits in India. The first two lessons are the most straightforward. First, decisions by the Supreme Courts of both countries expanding the constitutional protection of individual rights through the equality clauses of the respective Constitutions reduced the opportunities of both groups. The second lesson relates to the benefits of having a special provision in the Constitution to protect the State when it is making special provisions for the advancement of oppressed groups. Dalits have such a provision in the Indian Constitution, but blacks do not in the U.S. Constitution.

The last three lessons, however, are not generally recognized. These lessons are obscured because of the normal negative comparative framework that typically compares the situation of African-Americans to that of non-Hispanic whites. The third lesson highlights the far more positive justifications for affirmative action for African-Americans and other underrepresented minorities with a history of discrimination that exist in the U.S., in contrast to those for affirmative action through reservations in India. Fourth, African-Americans were able to make progress in obtaining access to higher education under the “separate but equal” regime through the creation and maintenance of HBCUs. In contrast, Dalits did not have the benefit of separate higher education institutions. Fifth, it is too early to tell how the changing racial and ethnic ancestry of the black population and the decreasing proportion of Ascendants will affect affirmative action. Regardless of one’s opinion on affirmative action, the changing ancestry of blacks who “benefit” from affirmative action stands as testament to the significant progress in the reduction of racism that blacks in American society have achieved compared to Dalits.

A. First Lesson: Both Groups are Helped and Harmed By Supreme Court’s Protection of Individual Rights

Individual rights can both help and harm groups subject to historical oppression based upon an involuntary trait. The purpose of individual rights is to foster the ability of individuals to choose what to do in and with their own lives. The non-discrimination aspect of individual rights rejects the idea of restricting the rights because certain individuals possess an involuntary trait. When the government in particular restricts individual rights, it denies the right of self-determination. When it is necessary to combat conscious discrimination based on an involuntary trait, protection of individual rights will be effective at assisting an oppressed group. Thus, both blacks and Dalits benefit from discrimination

307. “All minorities, whether based on religion or language, shall have the right to establish and administer education institutions of their choice.” INDIA CONST. art. 30, cl. 1.

laws that prohibit education institutions from denying them admission based solely on their race or untouchability. Nevertheless, the protection of individual rights places significant obstacles on the path to equality for oppressed groups. Protecting individual rights ignores the group effects of historical racial oppression or untouchability and hinders enactment of policies and practices seeking to ameliorate those group-based effects. Taking account of the involuntary traits of groups to overcome the effects of historical oppression appears to grant them favored treatment at the expense of the individuals who are from racial or caste groups that were not subjected to historic discrimination.

The U.S. Supreme Court, concluding that the Equal Protection Clause should only protect the rights of individuals, reduced the higher education opportunities of blacks in a number of its significant decisions. If the Court held true to its articulation of the original purpose of the Equal Protection Clause in the 1873 *Slaughterhouse Cases*, the higher education opportunities for African-Americans would, arguably, be greater today. In *Bakke*, the Court prohibited the reservation of a certain number of admissions seats for blacks or other minority groups because such reservations would violate the individual rights of those not from a "favored" group.³⁰⁸ In *Gratz*, the Supreme Court rejected a system of allocating points in the admissions process to individuals from under-represented minority backgrounds, including blacks.³⁰⁹ The Court required that colleges, universities or graduate programs that use affirmative action in admissions employ a holistic and individualized evaluation process.³¹⁰ Using such an admissions process substantially increases the administrative burden of institutions wishing to use affirmative action over a point system. Thus, instituting affirmative action became more expensive for institutions. Such a point system could be used for admissions decisions absent a concern about the inclusion of underrepresented minorities. The cost alone may reduce the attractiveness of affirmative action for some selective higher education programs.

While rejecting admissions quotas and point systems, the Supreme Court did allow selective colleges, universities and graduate programs to use race as one of many factors in an individualized admissions process.³¹¹ The basis for the use of race by these institutions, however, is the protection of the First Amendment right of academic freedom that colleges and universities possess, rather than a special concern about the rights of African-Americans who have suffered from historic racial oppression for centuries. As a result, whether to provide positive considerations to blacks in the admissions process is a matter of state law and the academic judgment of higher education officials; it is not a requirement to ameliorate past or present effects of racial discrimination.

The Supreme Court also reduced the potential higher education opportunities for blacks when it rejected strengthening state-operated

308. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

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

310. *Id.*

311. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

HBCUs as a partial remedy for the operation of an unconstitutional dual higher education system by the State of Mississippi.³¹² In rejecting this partial remedy, the Court noted that the remedial obligation of a formerly dual state university system was to ensure that the *choices* of prospective students regarding which college or university to attend were not impeded by the state's prior operation of a dual system.³¹³ Accordingly, the Court articulated that strengthening black public colleges and universities is not an adequate remedy for the state's operation of a dual system of higher education because of a respect for individual choice.³¹⁴ However, the result is to deny blacks the choice of attending academically strengthened public HBCUs, despite the fact that they were denied access to the better academic institutions reserved exclusively for whites during both the historic period of chattel slavery and de jure segregation.

Dalits have also seen their higher education opportunities reduced by the Indian Supreme Court's constitutional interpretations that have increased protection for individual rights. The 2005 Indian Supreme Court decision in *P.A. Inamdar v. State of Maharashtra*³¹⁵ has the potential to significantly reduce opportunities for Dalits. That decision placed government reservations for Dalits at private education institutions at the mercy of the political process when it concluded that these institutions have a constitutional right to be free from government control in the absence of clear legislative authority.³¹⁶ Even though Parliament quickly reacted to the decision by amending the Indian Constitution to give state and federal governments the power to establish reservations for Schedule Castes in non-minority private education institutions,³¹⁷ no legislative body has established those to this point. While it is too early to tell what the ultimate resolution will be, it is clear that for now, Dalits could lose significant higher education opportunities with this decision to protect individual rights of private institutions.

B. Second Lesson: Constitutional Provision Protecting the Government's Ability to Make Special Provisions for Scheduled Castes Places Dalits in a Better Constitutional Position than African-Americans

The Indian Constitution has a clause allowing the State to make any special provision for the advancement of Schedule Castes, Schedule Tribes and other socially and educationally backwards classes of citizens

312. *U.S. v. Fordice*, 505 U.S. 717 (1992).

313. *Id.* at 729.

314. *Id.*

315. (2004) 8 S.C.C. 139 (India Supreme Court, 2004).

316. *Id.*

317. The 93rd Constitutional Amendment Act s.2 reads, "Amendment of article 15.-In article 15 of the Constitution, after clause (4), the following clause shall be inserted, namely:- "(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to education institutions including private education institutions, whether aided or unaided by the State, other than the minority education institutions referred to in clause (1) of article 30."

(OBCs).³¹⁸ The Indian Supreme Court upheld this clause in *Indira Sawhney v. Union of India* when it also upheld the validity of reservations for government jobs.³¹⁹ In reaching this conclusion, the Indian Supreme Court reasoned that if reservations exceeded 50% of the jobs, then the exception would become greater than the rule.³²⁰ The Court has previously concluded that the fundamental right of equality contained within Article 15 (1) required the 50% ceiling on reservations.³²¹ Since the limitation on reservations applied to OBCs and not Dalits, the opinion protects reservations for Dalits from a right to equality challenge.

The U.S. Constitution does not have specific language allowing the government to make special provisions for the advancement of blacks or any other underrepresented group with a history of discrimination without violating the Equal Protection Clause, and these plans are vulnerable as shown in *Bakke*³²² and *Gratz*.³²³ Since discrimination banned under the Equal Protection Clause also violates Title VI of the 1964 Civil Rights Act,³²⁴ these decisions also apply to private colleges and universities receiving federal money. The history surrounding the Reconstruction Amendments ratification and the Supreme Court's statement regarding the purpose of those amendments in general—and the Equal Protection Clause in particular—in its 1873 opinion in the *Slaughterhouse Cases*³²⁵ suggests that these amendments were intended to provide the very kind of protection for blacks that Dalits receive from specific language in the Indian Constitution. However, the language of the Equal Protection Clause allowed the Supreme Court to later interpret it as a provision to protect the rights of individuals, rather than the rights of blacks as a group. When Justice Powell authored his deciding opinion in *Bakke*, for example, he stated:

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white 'majority,' . . . the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude.³²⁶

Justice O'Connor, in her opinion in *City of Richmond v. Croson*, reading the text of the Equal Protection Clause, stated that "the Framers of the Four-

318. INDIA CONST. art. 330-42.

319. *Indira Sawhney v. Union of India*, A.I.R. 1993 S.C. 477 (India Supreme Court, 1993).

320. *Id.*

321. *See Balaji v. State of Mysore*, 50 A.I.R. 1963 S.C. 649, 663 (1963) (holding that the total percentage of reservations permissible under Article 15(4) of the Indian Constitution should generally be less than 50%). *See also Rajkumar v. Gulbarga University*, 77 A.I.R. (Kant.) 320, 332 (1990) (following the 50% limit for reservations).

322. 438 U.S. 265 (1978).

323. 539 U.S. 244 (2003).

324. 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

325. 83 U.S. 36.

326. 438 U.S. at 293.

teenth Amendment . . . desired to place clear limits on the States' use of race as a criterion for legislative action."³²⁷

C. Third Lesson: Basis for Affirmative Action for African-Americans Suggest that They Are Held in Higher Regard in the United States than Dalits Are in India

When the Supreme Court affirmed the ability of selective colleges and universities to consider race in their admissions processes, it based this affirmation on the benefits derived from a diverse student body.³²⁸ O'Connor noted that the benefits of enrolling a critical mass of underrepresented minority students with a history of discrimination are substantial.³²⁹

Since colleges and universities in the U.S. are not required to enroll a critical mass of underrepresented minority students, including blacks, those that adopt affirmative action admissions policies must determine that the inclusion of blacks is educationally beneficial to all students. As Lee C. Bollinger, President of Columbia University and the former president of the University of Michigan, recently summarized:

Universities understand that to remain competitive, their most important obligation is to determine—and then deliver—what future graduates will need to know about their world and how to gain that knowledge. While the last century witnessed a new demand for specialized research, prizing the expert's vertical mastery of a single field, the emerging global reality calls for new specialists who can synthesize a diversity of fields and draw quick connections among them. In reordering our sense of the earth's interdependence, that global reality also cries out for a new age of exploration, with students displaying the daring, curiosity, and mettle to discover and learn entirely new areas of knowledge.

The experience of arriving on a campus to live and study with classmates from a diverse range of backgrounds is essential to students' training for this new world, nurturing in them an instinct to reach out instead of clinging to the comforts of what seems natural or familiar. We know that connecting with people very—or even slightly—different from ourselves stimulates the imagination; and when we learn to see the world through a multiplicity of eyes, we only make ourselves more nimble in mastering—and integrating—the diverse fields of knowledge awaiting us.

Affirmative-action programs help achieve that larger goal. And the universities that create and carry them out do so not only because overcoming longstanding obstacles to people of color and women in higher education is the right thing to do, but *also because*

327. 488 U.S. at 491 (1989).

328. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission.").

329. *Id.*

*policies that encourage a comprehensive diversity help universities achieve their mission. Specifically, they are indispensable in training future leaders how to lead all of society, and by attracting a diverse cadre of students and faculty, they increase our universities' chances of filling gaps in our knowledge with research and teaching on a wider—and often uncovered—array of subjects (emphasis added).*³³⁰

To admit that all students' education is benefited by the inclusion of black students is to admit that their presence is not just tolerated, but actually sought. The Supreme Court's opinion in *Grutter* also pointed out that the benefits of affirmative action go far beyond education.³³¹ The Court noted that diversity improves the development of skills necessary for the "increasingly global marketplace;"³³² improves the ability of the military to "fulfill its principle mission to provide national security;"³³³ and by making the paths to leadership open to all, increases the trust of the American people in their leaders.³³⁴

The justifications for affirmative action for Dalits are limited to the effects of historic oppression. There is no recognition that Dalits in the classroom, in businesses or in the military will strengthen Indian society. Justifications for affirmative action are far more positive for black students than Dalits because the presence of black students is *desired*, not justified solely on notions of compensating for historic oppression. Students would rather be welcomed into a place of learning with the mantra, "come and we can learn from each other," rather than a begrudging feeling of indebtedness for historical victimization.

D. Fourth Lesson: Segregation Provided Unique Opportunities for African Americans to Pursue Higher Education

While segregation was an oppressive system, in comparison to the history of Dalits, African-Americans were able to make significant advancements that have aided their collective struggle to eradicate the effects of oppression. Segregation involved separating blacks from whites, particularly in social relations, and severely limiting their employment opportunities. However, this separation also provided a separate sphere where blacks could develop their own talents and skills, even if they were limited to serving other blacks. In effect, blacks existed as a nation within a nation.³³⁵ Segregation required blacks to become trained as their own pro-

330. Lee C. Bollinger, Chron. Rev., *Why Diversity Matters*, 53 CHRON. HIGHER EDUC. 39, June 1, 2007, at B20.

331. *Grutter*, 539 U.S. at 330.

332. *Id.*

333. *Id.* at 331.

334. *Id.* at 332-33.

335. Dr. C. Munford described the black nation: "It is different from other emergent nations only in that it consists of forcibly transplanted colonial subjects who have acquired cohesive identity in the course of centuries of struggle against enslavement, cultural alienation, and the spiritual cannibalism of white racism. This common history which the Black people of America share is manifested in a concrete national culture with a peculiar 'spiritual complexion,' or psychological temperament. Though the Black nation expresses its thoughts, emotions, and aspirations in the same tongue as American whites, the different conditions of existence . . . have,

professionals such as lawyers, accountants, businesspersons, teachers, and doctors. They also had to publish their own newspapers and develop their own community organizations.

Dalits did not experience the advantages related to the self-autonomy that indirectly resulted from segregation. Hindu society never considered, nor treated, Dalits as a nation within a nation. Dalits were instead forced into the lowest status of society and compelled to perform occupations considered ritually impure. Even the idea of Dalits training themselves in diverse occupations to serve other Dalits was out of the picture. Thus, while HBCUs developed principally to train black professionals that were ultimately limited to working within the black community, they experienced some progress as compared to Dalits. While African-Americans trained in HBCUs became an educated elite class prepared to take advantage of opportunities that became available when American society opened to integration starting in the 1950s, Dalits remain disadvantaged because they are widely untrained for occupations other than those into which they have historically been forced.

The era of segregation in America was separate yet far from equal. Nevertheless, it was far better than the total denial of opportunities that Dalits experienced during the same period. Even though the Supreme Court's opinion in *Fordice*³³⁶ and other lower federal court opinions³³⁷ reduced education opportunities for blacks in public HBCUs, these public and private HBCUs still provide viable alternatives of higher education for black students, making them better off than they would be if these institutions never existed.³³⁸

E. Fifth Lesson: Decreasing Representation of Ascendants in Affirmative Action Programs

It is too early to tell what the impact on affirmative action will be from the increasing recognition that Black Biracials and Black Immigrants are

from generation to generation, welded the bonds of a national experience as different from that of white existence as day is from night. And what differentiates nations from one another are dissimilar conditions of life." Turner, *Black Nationalism: The Inevitable Response*, BLACK WORLD, Jan. 1971, at 7-8 (quoting Address by C. Munnford, Black National Revolution in America, Utah State University (May 1970)).

336. U.S. v. Fordice, 505 U.S. 717 (1992) (holding that Mississippi, with its continued operation of three historically black universities and five historically white universities, had failed to prove that it had ended de jure segregation of its higher education system).
337. See, e.g., Ala. State Teachers Ass'n v. Ala. Pub. Sch. and Coll. Auth., 289 F. Supp. 784 (M.D. Ala. 1968) (allowing construction of a new university built in "good faith [with] the basic requirement of the affirmative duty to dismantle the dual school system on the college level"), cert. denied, 393 U.S. 400 (1969); Norris v. State Council of Higher Educ., 327 F. Supp. 1368 (E.D. Va. 1971) ("a state is obliged to convert its white colleges and black colleges to just colleges"), cert. denied, 404 U.S. 907 (1971); Adams v. Richardson, 356 F. Supp. 92 (D.C. 1973) (stating that segregated systems of higher education violate Title VI of the Civil Rights Act of 1964).
338. See, e.g., Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Education Policy" Support the Continued Existence of Historically Black Colleges?* 43 EMORY L.J. 1, 10-134 (1994) (discussing the "indispensable role that historically Black colleges have played").

displacing Ascendants in affirmative action programs. Recognition of the potential problem created by the under-representation of Ascendants, however, requires acknowledging significant signs of progress in the reduction of racism that blacks face in American society compared to Dalits in India.

Interracial marriages and cohabitation, to varying degrees, will unite families, friends and other social networks of interracial couples. Increasing interracial marriages or interracial cohabitation is a reflection of weakening racial barriers and increasing social interaction between racial groups. Recall that America has only just passed the 53rd anniversary of the racially motivated and largely publicized murder of Emmett Till, a black fourteen-year-old boy who was killed for allegedly whistling at a white woman.³³⁹ Yet today, racial lines are fading, and the increasing acceptance of interracial relationships and mixed-race children is causing us to rethink the meaning of affirmative action.

In contrast, Indian society continues to view marriages between lower caste and upper caste Hindus, especially Dalits, with great disdain. For an overwhelming majority of Indians, their marriage prospects and partners are determined by their place of birth in the Hindu hierarchy. While inter-caste marriages have been legal in India since 1955,³⁴⁰ a survey last year by the Center for the Study of Developing Societies in New Delhi reported that 74% of Indians believed inter-caste marriages were unacceptable.³⁴¹ Members of inter-caste marriages often face hostility and ostracism. Many times these individuals are required to flee their homes to avoid "honor killings" by relatives of the higher-caste spouse. For example, a few years ago near New Delhi, relatives publicly executed an upper-caste girl and Dalit boy because the two had started a relationship.³⁴² Three men in a town near Mumbai (Bombay) in 2006 were sentenced to death for the murder of four people motivated by an inter-caste marriage.³⁴³ Another Brahmin man and two of his friends hacked his sister's husband, two of his relatives and one of his neighbors to death in May 2004 because the sister married into a lower-caste family.³⁴⁴ One news report on the honor killing of a couple stated that "the murders of young women and men, who have married by choice or across caste barriers, often go unnoticed. There are no names, not even statistics. Many are not investigated because the community closes ranks, apparently making it impossible to find out what really happened."³⁴⁵ These honor killings are not confined to India. Recently, a Hindu man was accused of

339. See Natasha Korecki, *It's time to get at the facts, prosecutor says; Mississippi DA says she'll file charges in Till case if justified*, CHI. SUN-TIMES, June 12, 2005, at 10.

340. The Hindu Marriage Act of 1955; Hindu Code.

341. Chu, *supra* note 78.

342. *Id.*

343. *Id.*

344. Jeremy Page, *Indians offered a cash bonus to marry beneath their caste*, THE TIMES (LONDON), Sept. 15, 2006, at 43.

345. *When Love Spells Death*, THE HINDU, Nov. 2, 2003, available at <http://www.thehindu.com/thehindu/mag/2003/11/02/stories/2003110200140200.htm> (recounting several stories of individuals in inter-caste marriages who were killed due to their choice of marriage partners).

setting fire to a 36-unit apartment building in Oak Forest, Illinois.³⁴⁶ The man started the fire at the apartment of his pregnant daughter, son-in-law and three-year-old grandson.³⁴⁷ All three died in the blaze.³⁴⁸ The man set the fire because his daughter married a person from a lower caste.³⁴⁹

Often the police look the other way when attacks on members of inter-caste marriages occur. However, “opposition to, intimidation of, and violence against inter-caste couples” recently drew the concern of a panel of two justices on the Indian Supreme Court.³⁵⁰ Justices Ashok Bhan and Markandey Katju directed government administrators and the police throughout India to protect these couples against harassment and to prosecute those who instigate this violence.³⁵¹ Justice Katju stated:

The caste system is a curse on the nation and the sooner it is destroyed, the better. In fact, it is dividing the nation at a time when we have to be united to face the challenges before the nation. Hence, inter-caste marriages are in fact in the national interest, as they will result in destroying the caste system. However, disturbing news is coming from several parts that young men and women who unite in inter-caste marriages are threatened with violence, or violence is actually committed on them.³⁵²

In an effort to change societal mores, in 2006 the Ministry of Social Justice and Empowerment proposed offering 50,000 rupees (£580) to higher-caste people who marry spouses from the lowest three groups in Indian society—Scheduled Tribes, Scheduled Castes or OBCs.³⁵³ This is a considerable amount given that the average annual income per capita in India is only £280.³⁵⁴ Several states were already offering financial payments for inter-caste marriages, ranging from 2,000 rupees in West Bengal to 50,000 rupees in Gujarat.³⁵⁵ The advancements in race relations resulting from interracial marriage in the U.S. make blacks—and American society in general—better off than Dalits with regards to discrimination against relationships.

Immigration of blacks from other parts of the world is also changing the ancestral make-up of blacks in the United States. Immigrants are increasingly competing with Ascendants for positions at colleges and universities, especially selective ones. Yet, the fact that blacks from the rest of the world want to immigrate to the United States is compelling evidence of the better position that African-Americans are in compared to Dalits.

346. Gerry Smith & Tina Shah, *Grandfather Charged in Blaze that Killed 3: Caste Dispute Cited in Oak Forest Fire*, CHI. TRIB., Jan. 2, 2008, State & Regional.

347. *Id.*

348. *Id.*

349. See Stefano Esposito & Rummana Hussain, *Motive: 'He didn't like his son-in-law.' Prosecutor says dad killed daughter, her family in fire*, CHI. SUN TIMES, Jan. 2, 2008.

350. See J. Venkatesan, *Inter-caste marriages are in national interest: court*, THE HINDU, July 8, 2006.

351. *Id.*

352. *Id.*

353. Jeremy Page, *supra* note 344, at 43.

354. *Id.*

355. *Id.*

V. CONCLUSION

The goal of this article was to compare the application of constitutional and federal anti-discrimination law to the higher education opportunities of African-Americans in the U.S. to Dalits in India. In so doing, we sought to provide an alternative view to the normal comparison of the condition of African-Americans to non-Hispanic whites. We understand the reason for this normal comparative framework to be a discussion of the progress, or lack thereof, on the way to racial equality. This normal comparative framework, however, carries with it an ongoing difficulty for African-Americans. As discussed in detail above, the comparison to non-Hispanic whites almost always leads to a perception that blacks have not made major gains in combating oppression. Even when progress on the road to racial equality is recognized, it is almost always accompanied by a simultaneous recognition that there is still a long way to go. Thus, in the midst of hope, there is always despair.

By shifting the comparative framework from non-Hispanic whites to Dalits, the strengths, accomplishments and positive aspects of the African-American struggle can more readily be identified. For example, the equal protection justifications for affirmative action are viewed in a completely different light. We do not address whether more African-Americans would benefit from affirmative action if it were based on a social justice rationale instead of diversity. That question is foreclosed by thirty years of Supreme Court opinions. However, basing affirmative action on the widespread benefits of diversity and inclusion requires a much more positive view of African-Americans than if it were based solely on notions of social justice. These justifications stem from a respect for the point of view of African-Americans instead of the notion that affirmative action is needed in order to elevate a degraded African-American community. Every college, university or graduate program that adopts affirmative action admissions policies must believe (or at least articulate a belief) that it enhances the education of all of its students. Thus, affirmative action operates as a sort of welcome sign posted on the door inviting equals, as opposed to an apology for making a group of people worse off through historic oppression.

Comparing the higher educational opportunities of African-Americans to Dalits also presents HBCUs in a much more positive light than the normal comparative framework. A look at the situation regarding the Dalits, who have never had separate colleges and universities, plainly reveals that the black community in the United States was made better off because of HBCUs. What becomes salient about HBCUs in this comparative framework is not their shortcomings, but their strengths. This perspective makes it far easier to see how HBCUs have aided the African-American community. Thus, regardless of the genesis of HBCUs, these education institutions enhanced the higher education opportunities of blacks in the past and continue to do so in the present.

In comparison to Dalits, the increasing diversity of black students—as a result of immigration of other black nationalities and interracial marriages—demonstrates how American society is in the process of overcoming its history of racial oppression of African-Americans. This

phenomenon is an indicator of widening racial acceptance. In addition, the increase in immigration of foreign black students may be another indicator of the increasing racial acceptance, since people within the African diaspora expect to enjoy it when they come to the U.S. to pursue education. The lack of immigrants seeking education in India may reflect the lack of opportunities and equality there.

Our arguments are not meant to understate the serious issues facing African Americans today. Reports generated by the No Child Left Behind Act show the dire condition of educational achievement of blacks in comparison to non-Hispanic whites reported by virtually every community in the United States. We are also aware of the gaps between blacks and non-Hispanic whites on standardized tests used to determine admissions to selective colleges, universities and graduate schools. We know about the differences in college attendance and graduation rates between blacks and non-Hispanic whites. We have also considered the socio-economic statistics of income, family wealth, life expectancy, incarceration rates and health-related disparities, and the image painted by them. But we are also aware that in the almost 400 years that African descendents have been in North America, comparing blacks to non-Hispanic whites has always led to negative conclusions about African-Americans. As our world continues to become smaller because of developments in technology and means of communication, it may become more appropriate to view the plight and advancement of African-Americans in the U.S. to communities in other places in the world. There are 160 million Dalits in India who would consider African-Americans to have experienced substantial progress in the way of achieving racial equality and opportunities in education and professional development. While this view may not be the best, we hope that it encourages broader considerations in the future of the progress of African-Americans in the area of equality and anti-discrimination in the United States.

