The Racial Gap in Ability: From the Fifteenth Century to Grutter and Gratz

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The Racial Gap in Ability: From the Fifteenth Century to _Grutter_ and _Gratz_

Kevin Brown

Justice O'Connor's opinion for the United States Supreme Court in _Grutter_ v _Bollinger_ upheld the University of Michigan Law School's affirmative action plan. Beneficiaries of affirmative action clearly meet the necessary qualifications for admissions to selective colleges, universities, and graduate programs. But, the justifications for affirmative action articulated by Justice O'Connor implicitly recognized that underrepresented minorities with a history of discrimination are not as academically qualified as their non-Hispanic white (and Asian counterparts). Their inclusion in affirmative action plans is based on the belief that they provide enough educational and non-educational benefits to offset their academic shortcomings.

There are measurable differences between the average, presumably objective and racially neutral academic credentials of underrepresented minorities with a history of discrimination and non-Hispanic whites (and Asians). But to put the existence of these differences in proper perspective it is important to note that for over five centuries Western societies have pointed to a number of presumably objective, racially neutral and nonbiased explanations for the conclusion that blacks (and people native to the Americas) are intellectually inferior to Caucasians (and to a lesser extent, Asians). The various forms of objective explanations and evidence offered in the past for the belief in the substandard intellectual abilities of blacks, for example, includes the argument that blacks were the victims of a divine curse placed upon human flesh; black skin was an aberrant development caused by being subjected to the inhospitable climate of Africa; intelligence could be determined based on the angle of the face or the shape of the head and that blacks' facial angles or head shapes were a manifestation of a substandard nature; cerebral capacity bore a relationship to intelligence, and because the skulls and the brains of blacks were smaller than those of whites (and Asians), blacks were considered less intelligent. This long uninterrupted history leads to the question: Are racial and ethnic differences currently noted in academic credentials used to determine admissions to selective colleges, universities, and graduate programs merely the latest chapter in the long history of evidence about racial differences that is discarded as the product of intellectual folly by later more enlightened generations?

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I. INTRODUCTION

Though the United States Supreme Court struck down the affirmative action program used by the University of Michigan's College of Literature, Science, and the Arts in Gratz v. Bollinger, the Court upheld the University of Michigan Law School's affirmative action plan in Grutter v. Bollinger. In Grutter, Justice O'Connor provided the deciding vote that strongly reaffirmed Justice Powell's 1978 opinion in Regents of The University of California v. Bakke. As Justice Powell did before her, Justice O'Connor rested her opinion for the Court in Grutter on a willingness to "defer[] to the Law School's [pedagogical] judgment that diversity is essential to its [academic] mission." Thus, Grutter allows selective colleges, universities, and graduate programs to continue to utilize affirmative action programs if they decide it advances their academic mission.

Since the Supreme Court's 1989 opinion in City of Richmond v. J.A. Croson Co., it was obvious that the Court would have to resolve the issue of the constitutionality of affirmative action programs in

1. 539 U.S. 244 (2003).
4. 539 U.S. at 328.
5. Id. at 334.
6. 488 U.S. 469, 476-77 (1989) (striking down a minority set-aside program for government contracts, a majority of the justices for the first time held that strict scrutiny applied to the use of racial classifications under the Equal Protection Clause regardless of the race of the beneficiaries).
higher education sooner or later. The Grutter opinion written by Justice O'Connor was more of an endorsement of affirmative action than many had anticipated. Constitutional scholars who did the counting for the past fourteen years always saw Justice O'Connor as the swing vote. There were indications that Justice O'Connor might be the swing vote to uphold affirmative action practiced by colleges and universities. But there was also convincing evidence that she would add her vote to the conservative four of Chief Justice Rehnquist and Justices Scalia, Thomas, and Kennedy in striking down both of the University of Michigan's affirmative action plans. Thus many saw the

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7. Justice O'Connor joined the five-person majority in the Court's 2001 decision in Easley v. Cromartie, 534 U.S. 234 (2001). In this case, the Court upheld a congressional redistricting plan from North Carolina against an equal protection challenge, concluding that the three-judge district court panel's determination that race was the predominant factor in the plan instead of politics was "clearly erroneous." Id. at 237. During the litigation, North Carolina pointed out that blacks are more likely to vote for the Democratic party if they are registered Democrats than whites. Id. at 239. As a result, a congressional legislative district that is safe for Democrats might also be a majority-minority district. Id. at 234. Justice O'Connor joined the opinion written by Justice Breyer holding that "[w]here majority-minority districts are at issue and racial identification correlates highly with political affiliation" challengers to such a plan have a high burden to meet. Id at 236. They must establish "that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles and that those alternatives would have brought about significantly greater racial balance." Id. This is something the challengers to the redistricting plan failed to do. See id. Thus, Justice O'Connor's fifth vote allowed a redistricting plan that was favorable to voters who happen to be African-American to survive a constitutional challenge. See id. Justice O'Connor also joined Justice Blackmun's 1992 concurring opinion in the Court's second school desegregation termination decision in Freeman v. Pitts, 503 U.S. 467, 509 (1992) (Blackmun, J., concurring). Justice Kennedy's opinion for the Court allowed a school system to obtain partial release from federal court supervision over an aspect of the system (such as student assignment), even though the system had not eradicated vestiges of its prior discriminatory conduct in other areas (such as assignment of teachers). See id. at 468-69. Justice Blackmun's concurrence was a more rigorous application of when partial release was allowed than the opinion for the Court. See id. at 510 (Blackmun, J., concurring). In Justice O'Connor's 1992 opinion in Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 869 (1992), she reaffirmed the basic holding of Roe v. Wade, 410 U.S. 113 (1973), by stating that "the basic decision in Roe was based on a constitutional analysis which we cannot now repudiate." Planned Parenthood, 505 U.S. at 869. If Justice O'Connor reaffirmed the politically divisive right to choose despite her misgivings about abortion, perhaps she would reaffirm affirmative action in higher education.

8. In the past, Justice O'Connor has joined or even written the opinion in a number of five-to-four cases that are generally understood as detrimental to the interest of minorities, particularly blacks. She authored the Court's 1989 City of Richmond v. J.A. Croson Co., opinion that struck down a minority set aside plan for prime construction contracts adopted by the City Council of Richmond, Virginia. 488 U.S. at 486. Justice O'Connor concluded that the former capital city of the Confederacy failed to establish the need for the program in order to remedy the existence of race discrimination in its construction industry. Id. at 497-505. She wrote that "[u]nless [classifications based on race] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial
outcome being a five-to-four decision striking down, rather than upholding, affirmative action.

As someone who was prepared for the Supreme Court to deliver opinions that struck down both of the University of Michigan's affirmative action plans, I thought that what Justice Scalia called the Court's "split double header" was a tremendous victory.9 It was pointed out in testimony during the trial in the Grutter case that
underrepresented minority students would have comprised only 4% of the entering class of the University of Michigan Law School in 2000 without the considerations of race or ethnicity instead of the actual figure of 14.5%.\footnote{10} Professor Linda Wightman in a 1997 law review article noted that if admission to law school in the 1990-91 application year had been determined solely on LSAT/UGPA without any consideration of race the percentage of blacks admitted to any law school would have dropped from nearly 50% to 10%.\footnote{11} For Mexican-Americans, the percentage of admitted students would have dropped from almost 57% to 23%; for Puerto Ricans, from 52% to 16%; and for Native Americans, from 62% to 31%.\footnote{12} Thus, the elimination of affirmative action would have significantly reduced the number of underrepresented minority students from groups with a history of discrimination admitted to this nation's law schools.

While I am overjoyed by these decisions, my euphoria exists only because these decisions were not rejections of affirmative action. I am also deeply troubled by the "split double header." \textit{Grutter} was not an opinion which indicates that final victory in the war against racial oppression that African-Americans have waged for almost 400 years is on the horizon. The main reason that I am deeply troubled by \textit{Grutter} was referred to by a number of justices in their opinions—it is the issue of the racial gap in what Justice Thomas called "academic credentials," particularly scores on standardized tests.\footnote{13} Justice O'Connor concludes her opinion for the Court by stating that

\begin{itemize}
\item \footnote{12} \textit{Id} at 22 tbl.5. The percentage reduction for whites was only from 58% to 55%, and for Asian-Americans from 62% to 40%. \textit{Id}.
\item \footnote{13} I see the primary problem with the affirmative action debate to be connected to different performance on standardized tests. For example, whites with equivalent undergraduate GPAs are much more likely to be admitted to at least one law school than any other group: seventy-two percent for white applicants, sixty-nine percent for Asian Americans, sixty percent for Hispanics, sixty-one percent for Chicanos, sixty-two percent for Native Americans, and forty-six percent for African-Americans. \textit{See} William C. Kidder, \textit{Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education}, 12 YALE J. L. & FEMINISM 1, 14 tbl. 4 (2000). In addition, a study done by William Kidder of applicants to Boalt Hall revealed some startling results. \textit{See} William C. Kidder, Comment, \textit{Does the LSAT Mirror or Magnify Racial and Ethnic Differences in Educational Attainment?: A Study of Equally Achieving "Elite" College Students}, 89 CAL. L. REV. 1055 (2001). He matched African-American, Chicano/Latino, Native American, and Asian-Pacific-American applicants with Caucasian applicants who possessed equivalent undergraduate GPAs from the same colleges during the same time period. \textit{Id} at 1073-74.
It has been 25 years since Justice Powell first approved the use of race to further an interest in student body diversity in the context of public higher education. Since that time, the number of minority applicants with high grades and test scores has indeed increased. We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.\footnote{539 U.S. at 343 (citation omitted and emphasis added).}

Justice Ginsburg's concurring opinion no doubt expressed the concern about racial gaps in academic credentials felt by many: "From today's vantage point, one may hope, but not firmly forecast, that over the next generation's span, progress toward nondiscrimination and genuinely equal opportunity will make it safe to sunset affirmative action."\footnote{Id. at 346 (Ginsburg J., concurring) (emphasis added).} Unfortunately, I believe Justice Thomas' more pessimistic interpretation of this problem is the accurate one. In his dissenting opinion in \textit{Grutter}, Justice Thomas states:

In recent years there has been virtually no change, for example, in the proportion of law school applicants with LSAT scores of 165 and higher who are black. In 1993 blacks constituted 1.1\% of law school applicants in that score range, though they represented 11.1\% of all applicants. In 2000 the comparable numbers were 1.0\% and 11.3\%.

What he found was that even when controlling for these factors, African-Americans scored 9.2 lower on the LSAT; Chicanos/Latinos, 6.8; Native Americans, 4.0; and Asian-Pacific-Americans, 2.5. \textit{Id} at 1074. Kidder also found that when he adjusted for undergraduate major there was no significant difference. \textit{Id} at 1076-79. Thus, all major minority groups scored lower on the LSAT than whites even when holding their date of graduation, college or university attended, GPA, and major constant. \textit{Id} at 1060. National data also indicates that testing imposes a greater barrier than do other measures of performance. See, e.g., William T. Dickens & Thomas J. Kane, \textit{Racial Test Score Differences as Evidence of Reverse Discrimination: Less than Meets the Eye}, 38 \textit{INDUS. REL.} 331, 338, 361-62 (1999) (indicating that data from the High School and Beyond Survey, a nationally representative sample of youth, revealed a smaller Black-White gap in high school grades than in SAT scores). The percentage plans adopted in California, Florida, and Texas for determining admissions to their selective colleges are also based on this assumption. \textit{Id}. They point to a way to maintain minority admissions in undergraduate education, at least if race-conscious admissions programs had been struck down, by placing more emphasis on grades. See \textit{id}. \textit{But see} Linda F. Wightman, \textit{Standardized Testing and Equal Access: A Tutorial, in COMPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES} 49, 86 (Mitchell J. Chang, Daria Witt, James Jones & Kenji Makuta eds., 2003) (claiming that the data shows that regardless of whether the admissions process was modeled by GPA and LSAT combined or by GPA only, the consequences would be a substantial reduction in the overall number of minority applicants admitted to ABA-approved law schools); see also Stephan Thernstrom & Abigail Thernstrom, \textit{America in Black and White: One Nation, Indivisible} 402-03 (1997) (arguing that the a wealth of evidence demonstrates that the racial gap in other measures of academic achievement is just as large as the SAT gap).

\textit{14. Id} at 346 (Ginsburg J., concurring) (emphasis added).

\textit{15. Id} at 346 (Ginsburg J., concurring) (emphasis added).
No one can seriously contend, and the Court does not, that the racial gap in academic credentials will disappear in 25 years.\textsuperscript{16}

Though the Grutter opinion was about law school admissions, a quick look at the performance of different racial and ethnic groups on the SAT and ACT tells us that this gap in academic credentials exists in undergraduate admissions at selective colleges and universities. Despite the improvement in the average SAT scores of black students from 686 in the 1975-1976 school year to 857 in 2002-2003, the gap between the SAT scores of African-Americans and that of non-Hispanic whites is still 206 points (1063 and 857, respectively).\textsuperscript{17} The gap between non-Hispanic whites and Native Americans is 101 points (1063-962); Mexican-Americans 158 points (1063-905); Puerto Ricans 154 points (1063-909); and other Hispanics 142 points (1063-921).\textsuperscript{18} After closing through the 1970s and 1980s,\textsuperscript{19} the disheartening aspect is that these racial and ethnic gaps have generally either stabilized or increased over the past ten years.\textsuperscript{20} While Asians

\textsuperscript{16} Id. at 376 (Thomas, J., concurring in part and dissenting in part) (citations and footnote omitted) (emphasis added).


\textsuperscript{18} THE COLLEGE BOARD 2003 COLLEGE-BOUND SENIORS, supra note 17, at 6.

\textsuperscript{19} In 1975-1976 the gap between the average SAT scores of African-Americans and whites was 258 (686 in comparison to 944).

\textsuperscript{20} For African-Americans in the 1990-1991 assessment year the gap was only 187 points (1031 as opposed to 846); in the 1996-1997 assessment year the gap had increased to 195 points (1052 as opposed to 857); in 1998-1999 it was 199 (1055-856); and in 2000-2001 it was 201 (1060-859). THOMAS D. SNYDER & CHARLENE M. HOFFMAN, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 2002, at 154 tbl. 133 (2003), at http://nces.ed.gov/pubs2003/2003060b.pdf. For Native Americans in the 1990-1991 assessment year the gap was only 93 points (1031 as opposed to 938); in the 1996-1997 assessment year the gap had increased to 102 points (1052 as opposed to 950); in 1998-1999 it was 90 points (1055-965); and in 2000-2001 it was 100 points (1060-960). Id. For Mexican-Americans in the 1990-1991 assessment year the gap was only 118 points (1031 as opposed to 913); in the 1996-1997 assessment year the gap had increased to 143 points (1052 as opposed to 909); in 1998-1999 it was 146 (1055-909); and in 2000-2001 it was 151 (1060-909). Id. For Puerto Ricans in the 1990-1991 assessment year the gap was only 156 points (1031 as opposed to 875); in the 1996-1997 assessment year the gap had increased to 151 points (1052 as opposed to 901); in 1998-1999 it was 152 points (1055-903); and in 2000-2001 it was 152 points (1060-908). Id. For other Hispanic or Latinos in the 1990-1991 assessment year the gap was only 111 points (1031 as opposed to 920); in the 1996-1997 assessment year the gap had increased to 118 points (1052 as opposed to 934); in 1998-1999 it was 128 points (1055-927); and in 2000-2001 it was 135 points (1060-925). Id.
outperform whites on the SAT (1083 to 1063), they actually score twenty-one points lower on the verbal portion (529 to 508). Asians and non-Hispanic whites also outperform all racial/ethnic groups on the ACT. The average composite score for the graduating class of 2003 for Asian-Americans was 21.8 and non-Hispanic whites was 21.7. In comparison the following are the average composite scores for the other racial/ethnic groups: Other Hispanics, 19.0; American Indians, 18.7; Mexican-Americans, 18.3; and African-Americans 16.9. While the gap for blacks increased over the past seven years, the gap for the other racial/ethnic groups decreased slightly.

A parallel development with the increasing racial gap on the SAT is the abandonment of school desegregation. Over the past fifteen years the amount of segregation in public elementary and secondary schools has been increasing. Justice Ginsburg noted in her opinion that figures from 2000-2001 indicate that 71.6% of African-American children and 76.3% of Latino children attend majority-minority schools. Ginsburg failed to mention, however, that this represents a trend of increasing racial and ethnic separation in the public schools.

The percentage of African-American students attending majority-minority schools increased from its all-time low of 62.9% in 1980-1 to 68.8% in the 1996-1997 school year to the current 71.6%. The percentage of African-Americans in schools that are 90% or more minority has also been increasing. The percentage has increased from 32.5% in the 1986-1997 school year to 35% in 1996-1997 to its all-time low of 37.4% in 2000. Latinos actually experience higher rates of segregation than blacks. For Latinos segregation has been increasing since the 1968-1969 school year. At that time 54.8% were in majority-minority schools and only 23.1% were in schools that were at least 90% minority. The percentage of Latinos currently in

21. Id.
23. Id.
24. For students graduating in 1997, for example, the average ACT score for blacks was 17.1 compared to 21.7 for both whites and Asian-Americans. See ACT, ACT National and State Scores: The 1997 ACT High School Profile Report—National Normative Data Table 5: Average Racial/Ethnic Group Scores by Level of Academic Preparation, at http://www.act.org/news/data/97/t5-6-7.html. All other racial/ethnic groups scored lower than whites and Asian American: American Indian, Mexican-American, and other Hispanics all scored lower on the ACT than Caucasians (19.0, 18.8, and 19.0, respectively). Id.
27. Id. at 31.
predominately minority schools is 76% and the percent in schools that are over 90% minority is also 37%.\(^{28}\) Thus, "we have already seen the maximum amount of racial mixing in public schools that will exist in our lifetime."\(^{29}\)

There will be those who will strenuously and forcefully argue that underrepresented minorities with a history of discrimination must make performance on standardized tests a priority for the next twenty-five years in order to significantly close or eliminate the racial or ethnic gaps in standardized tests scores. I declare, without reservation, that I will join my voice wholeheartedly with those exhortations. But I also realize that these students and their parents and guardians already take those tests seriously. They already know that standardized tests are the gatekeepers of opportunity in American society. Thus, such exhortations will not send a message that is any different than what underrepresented minority communities with a history of discrimination have been hearing for decades. Therefore, I fully expect that twenty-five years from now there will still be large racial and ethnic gaps in the standardized tests scores used to determine admissions to selective colleges, universities, and graduate programs unless something dramatic is done. I write this comment with that recognition fully in both mind and heart. If the tragic end of affirmative action and its attended consequences that were so narrowly avoided in the summer of 2003 are to be averted in the future, it will be necessary for American society to develop a different perspective on the objectivity of standardized testing. My primary purpose in this Article is to raise the question of whether our belief in the objective ability of standardized tests to determine admissions to selective colleges, universities, and graduate programs is not just the latest chapter in the long history of Western society’s generation of rationalizations for the continued oppression of people of color, especially African-Americans.

Part II will review the rationales provided by Justice O’Connor for allowing the consideration of race or ethnicity in *Grutter*. Implicit in her arguments is the belief that the benefits derived from the inclusion of a critical mass of underrepresented minorities with a history of discrimination outweighs their academic deficits. Part III will examine the presumably objective and neutral historical evidence developed throughout the centuries to support the notion that blacks in

\(^{28}\) *Id.* at 33.

particular fall short of the applicable norm. An issue that stands out in
the historical review of these justifications is the fact that the relative
racial rankings have consistently judged Caucasians and Asians as
superior with blacks and other native people as inferior. Thus, for
almost 300 years the presumably objective and neutral scientific
evidence for racial differences tends to reflect the same racial/ethnic
group rankings that are revealed on standardized tests used to
determine admissions to selective colleges, universities, and graduate
programs. Part IV will review the dissenting opinion filed by Justice
Douglas in the first affirmative action case in higher education to
reach the Supreme Court in 1974, \textit{DeFunis v. Odegaard}.\textsuperscript{30} Marco
DeFunis, a white man, challenged the affirmative action admissions
program being used at the University of Washington Law School.\textsuperscript{31} By
the time the Supreme Court heard oral arguments in the case, DeFunis
was in his last term at the Law School.\textsuperscript{32} As a result, a majority of the
justices decided to dismiss the case as \textit{moot}.\textsuperscript{33} Justice Douglas wrote a
dissenting opinion to the dismissal of the claim as \textit{moot}.\textsuperscript{34} In his
dissenting opinion, Justice Douglas articulated the alternative
perspective of standardized tests which must be embraced in order to
prevent the elimination of affirmative action programs at the expiration
of the twenty-five year grace period. Justice Douglas argued that it
was appropriate for the Admissions Committee of the University of
Washington Law School to set minority applications apart for separate
processing.\textsuperscript{35} The reason was that the use of the LSAT was culturally
biased.\textsuperscript{36} Thus, a presumably objective and race-neutral admissions
process was not race neutral at all.\textsuperscript{37} Rather the use of culturally biased
standardized tests worked to the disadvantage of minorities who have
cultural backgrounds that are vastly different from dominant
Caucasians.\textsuperscript{38} Perhaps Justice Douglass’s dissent in \textit{De Funnis} will one
day come to wield the same kind of influence on a more racially
enlightened American that Justice Harlan’s famous dissent in \textit{Plessy v.
Ferguson}\textsuperscript{39} wielded decades after he authored. It was necessary for the

\begin{itemize}
\item 30. \textit{416 U.S. 312 (1974)}.
\item 31. \textit{Id. at 314}.
\item 32. \textit{Id. at 315}.
\item 33. \textit{Id}.
\item 34. \textit{Id. at 320 (Douglas, J., dissenting)}.
\item 35. \textit{Id. at 331-32 (Douglas, J., dissenting)}.
\item 36. \textit{Id. at 335 (Douglas, J., dissenting)}.
\item 37. \textit{See id. (Douglas, J., dissenting)}.
\item 38. \textit{See id. (Douglas, J., dissenting)}.
\item 39. \textit{163 U.S. 537, 559 (1896) (Harlan, J., dissenting)} ("Our Constitution is color-
blind, and neither knows nor tolerates classes among citizens.").
\end{itemize}
Admissions Committee to offset that built-in bias if it were to determine admissions in a true racially neutral fashion.

II. RATIONALES ARTICULATED BY JUSTICE O'CONNOR’S OPINION IN *GRUTTER* FOR TAKING ACCOUNT OF RACE AND ETHNICITY

Justice O’Connor’s opinion for the five majority members of the Court in *Grutter* 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.""

Justice O’Connor goes on to note that the need for a critical mass is not premised 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, the unique experience of being a racial minority in a society where race unfortunately still matters will also affect a person’s views.

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 outcomes and better prepares students for an increasingly diverse workforce, [and] for society” as well as better prepares them as professionals.

Justice O’Connor then notes additional benefits that flow from diverse student bodies that are not directly related to improvements in the academic environment. “[M]ajor American businesses have made clear that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse

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41. *Id.* at 333 (quoting Respondent’s Brief at 30).
42. *Id.* at 330; see, e.g., WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS (1998); COMPPELLING INTEREST: EXAMINING THE EVIDENCE ON RACIAL DYNAMICS IN COLLEGES AND UNIVERSITIES, supra note 13; DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION (G. Orfield & M. Kurlaender eds., 2001).
people, cultures, ideas, and viewpoints.” Relying on the brief filed by high-ranking retired officers and civilian leaders of the military, Justice O’Connor also noted that their decades of experience reveals that “a highly qualified, racially diverse officer corps . . . is essential [for] the military . . . to fulfill its principle mission to provide national security.” 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. Finally Justice O’Connor notes that “universities, and in particular, law schools, represent the training ground for a large number of our Nation’s leaders.”

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 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 educational 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 . . .

The justifications provided by Justice O’Connor for allowing selective colleges, universities, and graduate programs to consider race and ethnicity are compelling ones. But implicit in these justifications is the recognition that underrepresented minorities are not as qualified as their non-Hispanic white and Asian counterparts. Their inclusion is justified, however, on the basis that it provides important benefits in terms of diversity of points of view and other considerations that outweigh their academic (intellectual) shortcomings.

III. HISTORICAL RATIONALES FOR RACIAL AND ETHNIC DIFFERENCES

In order to put the issue of the racial and ethnic gaps in academic credentials into proper perspective, it is important to take a historical perspective on evidence offered for racial differences. The existence of the academic racial gaps may simply be the latest chapter in the sad, sordid, and prolonged history of presumably objective, neutral, and nonbiased justifications for racism that have plagued Western societies

44. Id.
45. Id. at 331.
46. Id.
47. Id.
48. Id. at 332.
from the inadvertent first contact of the Portuguese with Africans more than 550 years ago. This Part will briefly review the history of these justifications that have been generated to establish the racial hierarchy of human beings: Caucasians, Asians, followed by lower groups including blacks. The same general ranking that has existed for hundreds of years with diverse evidence cited as proof is replicated in the different performance by racial and ethnic groups on the LSAT, SAT, and ACT.

This Part will first discuss the initial contact of the Europeans with the Africans through to the antebellum period in the United States. Economic motivations played a significant part in the selection of blacks by the Europeans (and later the forefathers of our nation) as the labor force to develop and cultivate the New World and their subsequent continued subordination under segregation after the Civil War. But economic motivations alone can never suffice to explain institutions like slavery and segregation. People are not motivated just by material needs and desires. To rest the justifications for such exploitation on economic motives alone requires ignoring the emotional, psychological, and spiritual dimensions of human nature. Throughout the centuries, religious, scientific, and cultural justifications have been propounded to justify the confinement of blacks and other minorities to an inferior status. It is very important to realize that a society which maintained institutions of slavery and segregation viewed those oppressive institutions as rational responses needed to cope with a reality that they were firmly convinced actually existed. The next two Subparts will focus on the objective and nonbiased arguments generated to justify black slavery and then to justify segregation. Finally this Part will briefly review the primary justifications articulated by the United States Supreme Court in Brown v. Board of Education,49 which launched American society into the Desegregation Era. In reading the Court's justification for striking down segregation with the cold reflection that comes fifty years after the opinion, the reality that the Court did not reject the fundamental belief in the inferiority of black people stands out. Thus, on one hand the Court's Brown opinion was consistent with a long line of its cases interpreting the rights (or lack thereof) of African-Americans based on the assumption that in some way blacks were less than the requisite norm. This legal assumption justified both chattel slavery and segregation. But, when situated in a historical context, Brown was a

fundamental break with justifications that upheld slavery and "separate but equal" because it attributed the inferiority of blacks not to ontological causes as had been done before, but to environmental ones. The view that the source of the "less than" nature of blacks results from environmental deficits was extraordinarily sanguine. If the black problem arose from a deficient social environment, then the cure for their apparent substandard nature was to improve their deficient social environment by increasing their interracial contact.

A. The Colonial and Antebellum Period

The first major cargo of blacks to reach European shores directly from Africa arrived in Lagos, Portugal in 1444. Prince Henry the Navigator was among those present to observe the novel spectacle of the unloading of 235 slaves ranging from white Muslims to mulattoes to black Africans. One-fifth of the slaves were given to Prince Henry, who gave thanks for "saving so many new souls for God."  

Soon after Columbus's voyages of discovery, the Spanish realized that in order to mine silver and gold, plant spices and sugar, and raise hides in the New World, it needed a new labor force. While a few European slaves and indentured servants were sent to America by the Spanish, their numbers were inadequate to meet the labor needs. Early efforts to enslave enough of the native population to meet the labor demands generally proved unsuccessful. The first indigenous people that the Spanish, and later the Portuguese, attempted to enslave tended to come from hunter/gatherer civilizations. They did not adapt well to the rigors of repetitive, arduous, and continuous work. In addition, diseases brought by the Europeans for which the indigenous people had no immunities devastated their population. The first major smallpox epidemic occurred only twenty-six years after Columbus first landed in the New World. This led the Spanish to start importing Africans. By as early as 1510, the Spanish realized that the Africans were better workers and more likely to survive captivity than the natives.

The first successful colony planted in North America by the English 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

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British North America.\textsuperscript{51} The Norfolk-born first recorder of Virginia, wrote: "About the last of August, came in a Dutch man of warre that sold us twenty Negars . . . ."\textsuperscript{52}

Throughout much of the seventeenth century, North American landlords and planters preferred white European indentured labor to that of blacks. While many black slaves were imported, during the first hundred years of colonization some 400,000 English left for the New World.\textsuperscript{53} By the beginning of the eighteenth century, however, the availability of indentured servants—those who were willing or who could be forced to come and work in America—proved insufficient.\textsuperscript{54} Like the Portuguese and Spanish, the early English settlers also attempted to supply their additional labor needs by enslaving the native population. These efforts also proved unsuccessful.

The Africans first brought to British America were treated as indentured servants or apprentices for life. Their children were considered to be free. In 1661, however, Virginia became the first colony to provide by law for perpetual servitude of blacks.\textsuperscript{55} Maryland joined Virginia's lead two years later, New York did so in 1706, and the rest of the colonies followed suit thereafter.

By the time the architects of the Constitution met in Philadelphia in 1787, blacks had been in North America for almost 170 years, and Europeans had been taking Africans out of what they called the "Dark Continent" for over 340 years. The acceptance of slavery as an institution at the Constitutional Convention and recognition of the substandard nature of those who were enslaved was a foregone conclusion. At the heart of the Constitution was the protection of property and wealth. Nearly twenty percent of the population, almost one out of every five persons, was owned by another. Ownership of slaves constituted an important form of property and a tremendous amount of wealth; further, slaves generated a significant portion of the income for many citizens of the new nation. A government constituted in part to protect property could not, consistent with that purpose,

\begin{itemize}
\item \textsuperscript{51} Id. at 174.
\item \textsuperscript{53} 1 Virginia Bernhard et al., Firsthand America: A History of the United States 16 (2d ed. 1992).
\item \textsuperscript{54} See Thomas, supra note 50, at 453.
\item \textsuperscript{55} In one 1671 Virginia declaration, slaves were put in the same categories as sheep, horses, and cattle. See Joe R. Feagin, Racist America: Roots, Current Realities, and Future Reparations 41 (2000).
\end{itemize}
deprive so many of their most valuable assets. Not one of the fifty-five
delegates present at the Constitutional Convention seriously advocated
for the abolition of slavery.\textsuperscript{56} But the issue of slavery intruded on many
debates conducted by the delegates. Even though the term "slave" or
"slavery" was artfully left out of the Constitution, at least seven
provisions addressing slavery were included in the basic document that
provided for the structure of the American government.\textsuperscript{57}

In discussing the condition of blacks during the Antebellum
period, a significant factor to note is that throughout this period blacks
were concentrated in the South. At the time of the Constitutional
Convention over ninety-three percent of the blacks resided in the five
southernmost states of Virginia, North Carolina, South Carolina,
Georgia, and Maryland;\textsuperscript{58} and on the eve of the Civil War ninety-one
percent of blacks resided in the states that legalized slavery.\textsuperscript{59} The
Atlanta \textit{Daily Intelligencer} captured the spirit of the southern
perspective on the view of blacks during the Antebellum period:

We can't see for the life of us how anyone understanding fully the great
principle that underlies our system of involuntary servitude, can
discover any monstrosity in subjecting a Negro to slavery of a white
man. We contend on the contrary that the monstrosity, or, at least, the
unnaturalness in this matter, consists in finding Negroes anywhere in
white communities not under the control of the whites.\textsuperscript{60}

\begin{itemize}
\item \textsuperscript{56} \textit{Id.} at 12.
\item \textsuperscript{57} (1) \textit{Article} 1, Section 2, which counts slaves as three fifths of a person; (2) \textit{Article}
\textit{1}, Sections 2 and 9, which apportion taxes on the states using the three-fifths formula; (3)
\textit{Article} 1, Section 8, which gives Congress the authority to suppress slave and other
insurrections; (4) \textit{Article} 1, Section 9, which prevents the slave trade from being abolished
before 1808; (5) \textit{Article} 1, Sections 9 and 10, which exempt goods made by slaves from
export duties; (6) \textit{Article} 4, Section 2, which requires the return of fugitive slaves; and (7)
\textit{Article} 4, Section 4, which stipulates that the federal government must help state
governments put down domestic violence, including slave uprisings. \textit{DONALD E. LIVELY, THE}
\item \textsuperscript{58} \textit{RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF \textit{BROWN} v \textit{BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY} 31-33 (1976).
\item \textsuperscript{59} \textit{BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. P-23, NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790-1978, at 254 (1979). While blacks began to spread throughout the
country in the twentieth century, the 1910 census showed that eighty-nine percent of African-
Americans resided in the South. \textit{Id.} at 13. Even as late as 1940, fourteen years before
\textit{Brown}, the South was home to over three-quarters of the African-American population. \textit{Id.}
The most authoritative legal decision authored by the United States Supreme Court expressing the constitutional view of blacks and their rights during the antebellum period was Chief Justice Taney's 1857 opinion in *Scott v. Sandford*. 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 found that people of African descent (slave or free) were not considered citizens within the definition of the Constitution. As a result, the federal courts were closed to them. In interpreting the understanding of the Founders of the country with regard to blacks, Taney wrote:

[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. . .

Taney went on to state in this opinion that blacks had been stigmatized with "deep and enduring marks of inferiority and degradation."

During the antebellum period, though blacks were not slaves in the North, the dominant beliefs about them there were also structured around an acceptance of their second-rate nature. Blacks were locked into the bottom of the racial caste system by custom, if not by explicit 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 Lord's Supper after whites. They were segregated in housing, schools, hospitals, and cemeteries. Boston, Cincinnati, New York, and Philadelphia all had segregated ghettos. Indiana, Illinois, and Oregon incorporated in their constitutions provisions restricting the admittance of Negroes into the states. Free blacks could not testify as witnesses against whites in court, were excluded from jury service, and could not become government officials.

\[61. \] 60 U.S. (19 How.) 393 (1857).

\[62. \] See id. at 404.

\[63. \] Id. at 407 .

\[64. \] Id. at 416.

Free blacks were also generally denied political equality in the North and border states. They were disenfranchised in Delaware in 1792, in Kentucky, Maryland, and Ohio in 1799, and in New Jersey in 1807. Between 1814 and 1860, free blacks in Connecticut, New York, Iowa, Wisconsin, Minnesota, Pennsylvania, Indiana, Illinois, and Michigan had the vote taken away from them altogether, denied to them as new states were incorporated into the Union, or had their exercise of the franchise severely restricted. By the eve of the Civil War, only six percent of the African-Americans in the North lived in the five northernmost states—Massachusetts, New Hampshire, Vermont, Maine, and Rhode Island—which allowed them to vote on equal terms with whites.  

There were always those Americans who saw slavery as the “great and foul stain” on the soul of the nation, a canker which corroded the moral and political will of the nation. But even in the abolition movements in the North, the belief in the inferiority of the descendants of Africa was an accepted aspect of their policies. Many of those who believed that slavery was wrong, nevertheless, accepted the reality that blacks were incapable of being assimilated politically, socially, or physically into white society. For example, Judge Samuel Sewall wrote a highly regarded pamphlet entitled The Selling of Joseph in 1700, which made the first reasoned critique of the slave trade and slavery itself. Sewall drew upon the Old Testament story in which Joseph, the son of Jacob, was sold into slavery in Egypt by his brother. Sewall argued that since Joseph’s brothers had no right to sell him into slavery, the purchaser of Joseph could not acquire a legal right to own him. The same could be said of those who bought African slaves. Despite criticizing slavery in his pamphlet, Sewall made it clear that “Blackamores” (as he called the Africans) seldom used their freedom well and they could never embody with whites and grow up into orderly families to help people the land. Even the “Great Emancipator,” Abraham Lincoln, deeply believed in the superiority of the white race. Lincoln expressed this belief during his senatorial debates with Stephen A. Douglas in 1858:

I will say, then, that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of white and black races; that I am not, nor ever have been, in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; and I will say, in addition to this, that there is a physical difference between the black and white races which I believe will forever forbid the two races living together on terms of social and political equality. And inasmuch as they cannot so live, while they do remain together there must be the position of superior and inferior, and I as much as any other man am in favor of having the superior position assigned to the white race.69

B. Objective and Nonbiased Evidence that Supported Enslaving Blacks

At the time of initial contact between Europeans and Africans in the fifteenth century, the divine word of the Almighty was held sacrosanct in European societies. Thus, the original justifications for slavery and ontological racial differences were rooted in interpretations of the inviolable will of God. Long before the first African set foot on North American soil, Biblical justifications for placing blacks in a condition of servitude abounded.70 Proponents of the institution of slavery found support in the Old Testament. Abraham, the Father of Three Faiths, owned slaves. In chapter 25 of Leviticus, God specifically authorized the Israelites to enslave the heathens among them, but not the descendants of Israel.71 As long as the Europeans were enslaving heathens—which they considered the Africans to be—not only did the Almighty not prohibit it, He positively sanctioned it. In the New Testament, the Apostle Paul’s epistles took slavery for granted.72 Thus, it was argued that slavery could not be a sin against Divine law, because it had the imprimatur of the Bible.73

Perhaps the primary religious justification for specifically enslaving blacks is derived from the curse Noah placed on the

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69. CIVIL RIGHTS AND AFRICAN-AMERICANS, supra note 52, at 171-72 (quoting Abraham Lincoln, Speech at Charleston, Ill. (Sept. 18, 1858)).
72. See, e.g., 1 Corinthians 12:13; Titus 2:9-10; Philemon, Colossians 3:22; Ephesians 6:5-6.
descendants of Ham. The Ham legend was generally accepted in Christian communities by the 1500s and was used to justify the argument that the enslavement of blacks was the result of a divine curse which no human had the right to alter. According to Genesis 9:21-27, Noah became drunk and was lying naked in a stupor in his tent when he was discovered by his son, Ham. Ham saw the nakedness of Noah and told his two brothers, Shem and Japheth. The other two brothers took a garment, laid it upon their shoulders, went backwards and covered their father. They never saw Noah's nakedness. When Noah awoke and discovered what had happened, he blessed Shem and Japheth but cursed the descendants of Ham to be servants to Shem and Japheth. Both Christians and Muslims had long come to believe that the descendants of Ham were turned black. Oral stories of the Hebrews collected in the Babylonian Talmud from the second to the sixth century CE also stated that the descendants of Ham were cursed by being black.

Solid scientific evidence was also thought to demonstrate the logical need for slavery. Scientists began studying racial differences long before the adoption of the Constitution. While scientists have relied upon different proofs, their presumably objective and nonbiased evidence has consistently concluded that blacks in some relevant way are substandard.

The first use of the word "race" did not occur until 1606, and there were only five discussions relating to the varieties of mankind during the entire seventeenth century. The first group of scientists to record racial differences, the natural scientists, blended religion with their explanations of the differences between people. These first racial "scientists" were not so much seeking to develop scientific ideas as they were attempting to describe God's divine plan that could be discovered by studying nature. They noted that nature delights in inequality. They envisioned the whole of nature as one gigantic ladder of being that went from the lowliest and simplest creatures to the most

74. Feagin, supra note 55, at 74.
75. See Gossett, supra note 70, at 5; see also Winthrop D. Jordan, White Over Black: American Attitudes Toward the Negro, 1550-1812, at 18-19 (1968).
78. Id.
developed and complex ones. In the great chain of being, the African stood somewhere between Caucasians and the orangutan. The African, however, was viewed as having more in common with the beast of the field than with the advanced Caucasian race.

In 1684 Francois Bernier, a French physician, became the first person to authoritatively divide humans based on skin color. In 1735 Carolus Linnaeus, however, was the first one to formalize the racial hierarchy scientifically. Linnaeus divided humans into four races, Homo Europeaus, Homo Asiaticus, Homo Africans, and Homo Americanus. He linked culture and biology together in a way that has survived to this very day. Linnaeus' characteristic traits would be ones that many would assume to be true even today. Linnaeus noted that Homo Europeaus was gentle, acute, inventive, and governed by custom. Homo Africans, in contrast, were crafty, indolent, negligent, and governed by caprice.79 Homo Asiatic's characteristic traits included being haughty, severe, covetous, and governed by opinions.80 German anatomist and anthropologist Johann Blumenbach also worked out an influential racial classification. In a ranking that parallels the results of the LSAT, Blumenbach listed Caucasians at the top of the human ladder with Asians, Africans, Native Americans, and Polynesians at the lower rungs.81

By the end of the eighteenth century the inferiority of the blacks, derived from the scientific understanding about the differences in nature, was generally accepted as indisputable scientific fact. The first edition of the Encyclopaedia Britannica in 1798 in its entry on "Negroes" asserted that they were a people of "idleness, treachery, revenge, cruelty, impudence, stealing, lying, debauchery, nastiness and intemperance."82 Blacks were also said to be "strangers to every sentiment of compassion" and were "an awful example of the corruption of man when left to himself."83

Throughout much of the latter part of the eighteenth and the nineteenth century, scientists espousing views of black inferiority were embroiled in a theoretical debate about the causes of this inferiority. Scientists writing before Charles Darwin published his book in 1859 entitled Origin of Species advanced one of two positions. There were

79. JORDAN, supra note 75, at 220-21.
80. Id.
81. FEAGIN, supra note 55, at 81.
83. Id.
those who were monogenist and accepted the validity of the *Genesis*
account of the creation of Adam and Eve. The monogenists argued
that while all humans come from one source, since creation the races
had diverged and developed their own capacities. Georges Louis
Leclerc de Buffon, in his 1778 book, *Natural History of Man*, argued
that white was the real and natural color of man. Thus, the standard
from which to judge was that of white skin. Given that the objective
and neutral standard of the proper color of humanity was white skin,
this meant that there must be an explanation for the aberration of black
skin. While physician Benjamin Rush contended that the black hue of
the negro was the result of leprosy, the answer most often accepted by
the monogenists was that black skin was an aberrant development
due to extensive exposure to the sun in hot climates. Even with
this climatic theory to explain racial differences, the monogenists were
in two different camps regarding its implications. While admitting that
racial differences had developed gradually over time, some argued that
those differences were permanent now. Others argued that the climatic
explanation implied an ability to reverse the influence of climate over
time. Monogenists, taking their lead from de Buffon, were in
agreement, however, that the black race was the one that had been
negatively impacted by an inhospitable climate.

Other scientists rejected a literal interpretation of *Genesis* and
adopted the position of polygeny. Polygeny had a significant number
of followers in the United States. It asserted that the human races were
derived from separate biological species. Blacks were thus another
form of life altogether different from whites. Louis Agassiz and
Samuel Morton were the best known of the polygenists. Agassiz, a
Harvard professor, founded and directed the Museum of Comparative
Zoology. In the relative ranking of the races, Agassiz assigned the
lower rung of the human ladder to blacks. He noted that Africa had
never produced a regulated society that could benefit from the
advantages afforded by civilization. When asked if his theory of
polygeny contradicted the account of creation of Adam in *Genesis*,
Agassiz responded that the *Genesis* account spoke only of the creation
of the Caucasian race.

84. See, e.g., Benjamin Rush, Observations Intended to Favor a Supposition that the
Black Color (as It Is Called) of the Negroes Is Derived from the Leprosy, Address Before the
American Philosophical Society (July 14, 1792), in 1 RACIAL THOUGHT IN AMERICA, supra
note 67, at 218, 218-25.
85. See CORNEL WEST, PROPHESY DELIVERANCE!: AN AFRO-AMERICAN
REVOLUTIONARY CHRISTIANITY 56-57 (1982).
Samuel Morton provided the empirical work used to buttress the theory of polygeny. Morton was a Philadelphia physician who had a reputation as a great data gatherer. His work won him praise from the eminent jurist, Justice Oliver Wendell Holmes. Morton had a large collection of human skulls, over 1000 at the time of his death. He published three major works on the sizes of human skulls between 1839 and 1849. In a ranking that parallels those of the LSAT and other standardized tests used to determine admissions to selective colleges, universities, and graduate programs, Morton argued that his work proved that Caucasians had the largest skulls, followed by Mongolians, American Indians, and then Africans. The differences in the skulls were evidence that Caucasians had different origins than those of other racial groups. In addition, because intellectual superiority was tied to cerebral volume, Caucasians were also the most intelligent group.\(^{87}\)

Following the well-accepted position of the natural scientists concerning the inferiority of blacks was the science of physiognomy, e.g., the science of discovering temperament and character from outward physical appearance, especially the face. The Dutch anatomist, Pieter Camper, demonstrated that there exists a connection between facial and cranial measurements and personality traits and character. Camper showed that a beautiful face and a beautiful body were inseparably attached to a beautiful nature, a beautiful character, and a beautiful soul. He proved that the optimal facial angle was 100°. Since the facial angle of Europeans measured out at 97°, they were closest to the optimal angle.\(^{88}\) Black people by contrast measured between 60° and 70°.\(^{89}\) This placed them closer to apes and dogs than human beings.\(^{90}\)

In the mid-nineteenth century, Paul Broca, the founder of the Society of Anthropology of Paris, broke new ground in the understanding of how the human brain functions. He measured the shape of the head and developed a cephalic index. Broca demonstrated that variations in the human head shape were linked to significant differences in the races. Black skin and wooly hair were associated with inferior intelligence, while white skin and straight hair were the equipment of the best group.\(^{91}\)

87. For a critique of the work by Morton, see id. at 82-101.
88. WEST, supra note 85, at 56-58.
89. Id.
90. Id. at 57-58.
In 1856 the first American translation of the four-volume treatise on racial inequality written by French diplomat Count Joseph Arthur de Gobineau was published. Gobineau was considered the most influential thinker about racial differences of the nineteenth century. Gobineau concluded his treatise by proclaiming that he had demonstrated that the various branches of the human family are distinguished by permanent and ineradicable differences, both mentally and physically. Their intellectual capacities, personal beauty, and physical strength were different. He admitted the possibility that there may be special individuals of the degraded black race who could be found with active and vigorous minds that greatly surpass in fertility of ideas and mental resources the average white peasant and even some in the middle classes. Nevertheless, the general conclusion of the inferiority of the black race held true. According to Gobineau, society should not allow the rare performances of exceptional individuals to undercut the general rule about racial capabilities.

C. Objective and Nonbiased Evidence that Supported Segregation

Concurrent with the end of slavery, scientific explanations regarding the differences between the races underwent a dramatic change. The publication of Charles Darwin’s *Origin of Species* in 1859, on the eve of the Civil War, required scientists to rethink their theories explaining racial differences. Evolution theories swept away the religious and old monogenicist/polygenist discussions about racial differences.

There were three different groups of social Darwinists. One group followed Charles Darwin’s statement in his *The Descent of Man*, published in 1871. Darwin wrote, “[a]t some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate and replace throughout the world the savage races.” By the 1890s, tough-minded racial Darwinists like Frederick Hoffman were exalting census statistics showing higher black mortality and lower black birth rates than those of whites as a

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92. See Feagin, supra note 55, at 82.
93. See Gould, supra note 86, at 381.
96. Id. at 201.
demonstration of the futility of egalitarian or even traditionally paternalistic approaches to black economic, social, and political participation. Hoffman argued that emancipation from slavery had been the worst thing that ever happened to blacks, because as enslaved people at least their needs were met. Nathaniel Shaler, a prominent social scientist and a dean at Harvard University, argued that blacks were inferior. He went on to assert that the law of natural selection meant their eventual extinction. Lewis Henry Morgan also argued for the extinction proposition. He asserted that because the black race was in a lower stage of development than whites, when blacks were brought into contact with the superior white race they were unable to compete. The eventual result would be the disappearance of the black race.

Social Darwinists who were not preaching the eventual extermination of the black race were not much more complimentary to blacks. Many evolutionary scientists of the day examined research into racial differences, like that done by Sanford Hunt. Hunt was a U.S. surgeon and pioneer in the field of anthropometry—the study of the physical characteristics of the races—who updated the work of Samuel Morton. He studied the results of 405 autopsies during the Civil War. He discovered that the average weight of the brain of a black person was five ounces lighter than that of the average white brain. By studying skulls that he had obtained from Ancient Egypt, Hunt also noted that these differences among racial types had existed for thousands of years. Ten years after the United States Supreme Court’s opinion in *Plessy v. Ferguson*, a researcher at Johns Hopkins reiterated Hunt’s findings. In an article published in the American Journal of Anatomy, he claimed that the skulls of blacks were smaller than those of whites, and their brains were “less convoluted.” Therefore, blacks possessed deficient brains.

From this data, racially optimistic Social Darwinists argued that intelligence evolves slowly over a long period of time. Blacks were destined to evolve to the level of whites, but slowly. Though it would take hundreds of thousands of years, eventually blacks would make up the deficit and achieve intellectual equality with whites.

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98. See *Tucker, supra* note 91, at 653-54.
100. See *id.*
101. 163 U.S. 537 (1896).
102. KLUGER, *supra* note 58, at 306.
Another group of Social Darwinists turned the arguments of the optimistic ones on their head. They asserted that while blacks were evolving, so were whites. More importantly, however, whites were actually evolving at a faster rate than blacks. Thus, the gap between the two races was actually growing larger not smaller. No matter how inferior blacks of the present seemed to whites of the present, the future would only see the situation grow worse.

The end of the Civil War and the abolition of slavery made it necessary for scientists to consider another problem brought about by the potential for racial mixing outside of the limits of slavery-miscegenation. Thomas Jefferson noted long before the abolition of slavery that blacks favor white beauty “as uniformly as is the preference of the [orangutan] for the black women over those of his own species.” Benjamin Franklin also expressed the view of most Caucasians in the eighteenth century about interracial sex. He argued that white amalgamation with the other color produces a degradation to which no lover of his country and no lover of excellence in the human character can innocently consent. Because sex with blacks was considered licentious and savage, anyone born of such an act inherited the very characteristics of the act.

At the beginning of the nineteenth century, Jean Baptiste Lamarck developed an evolutionary theory that was to become important in the debates in the latter half of the century about miscegenation. Lamarck noted that there was an unconscious striving of organisms to improve their species. The male of a species has an instinctive drive to mate with the best female possible. In many species males fight each other, and the stronger one gets first choice of the females. In this way, the best male and female mate.

103. See Hovenkamp, supra note 70, at 633-34.
107. See LOREN EISELEY, DARWIN’S CENTURY: EVOLUTION AND THE MEN WHO DISCOVERED IT 51-52 (1958). Jean Baptiste Lamarck (1744-1829) was an early evolutionist who believed in alteration of species rather than extinction. He believed that physical characteristics of organisms, caused by their bodies’ responses to physical needs, and developed due to changed habits during a particular organism’s lifetime, could be passed down to their offspring. Id.
108. See id. at 119-25.
Lamarck laid the framework that post-Darwinians would use to provide biological explanations of the propensity of black males to lust after white women. This natural drive would lead black males to raping and attacking desirous white women. Segregating blacks in public schools where close affinities across racial lines could be developed was deemed a necessary aspect of social policy. But more would be needed to combat the instinctive passions of burly black male beasts for white women. Lynchings became a prominent social policy to combat this natural urge. The primary justification for the over 3,500 lynchings of black men that occurred between 1882 until 1927 was the uncontrollable sexual drive of black men that led them to lust after white women.109

As the twentieth century dawned, scientists provided a new form of evidence for proving the substandard nature of the black race—intelligence testing. In 1904, Alfred Binet was commissioned by the minister of public education in France to develop techniques to identify children whose lack of success in normal classrooms suggested a need for some form of special education. Binet developed a series of short tasks related to everyday problems that were intended to assess basic reasoning processes such as ordering, comprehension, invention, and censure.110 Binet did not assert, however, that he was measuring an innate, genetically inherited capacity. The theory that IQ is the result of heredity was an American product.111 H. H. Goddard brought Binet’s ranking scale of intelligence to America and reified it into a score about innate intelligence.

In 1916, Lewis Terman, a professor at Stanford University, revised Binet’s scale and increased the number of tasks to be performed on the IQ test. He gave his revision the name, Stanford-Binet. Terman relentlessly emphasized that the IQ tests measured the limits of intelligence and the inevitability of those limits. “Practically all of the investigations which have been made of the influence of nature and nurture on mental performance agree in attributing far more to original endowment than to environment.”112 Terman argued that those whose IQs were below 100 should not be admitted to professions of prestige and monetary reward. Substantial success in such

109. Feagin, supra note 55, at 60.
111. See id. at 185.
occupations probably took an IQ of 115 or 120. By identifying in advance those who were feeble-minded, Terman argued that intelligence testing could curtail crime, pauperism, and industrial inefficiency. With the mentally infirm identified, appropriate measures could be adopted to control their socially destructive tendencies.

R.M. Yerkes, a Harvard University professor, convinced the U.S. Army to allow him to administer intelligence tests to all of its World War I recruits. Yerkes argued that he could assist in the war effort by efficiently identifying those people who should be leaders and those who should be commanded. Yerkes, Terman, Goddard, and other colleagues developed the army's mental tests in the summer of 1917. As an army colonel, Yerkes presided over the administration of these tests to 1.75 million World War I recruits. One of Yerkes' lieutenants, E.G. Boring, selected 160,000 case files and produced results from this sample. His results confirmed that blacks were a mentally deficient race. He found that blacks were at the bottom of the intellectual scale, with a full eighty-nine percent testing out at the level of morons or below.113

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

113. GOULD, supra note 86, at 227.
D. Rationales for Desegregation

It was the growth of opponents to the inherited notions of intelligence that set the stage for Brown v. Board of Education. The Court began its analysis in Brown with the assumption that the physical facilities and other tangible factors of the separate public schools attended by black and white students were equal. Given the tangible and measurable equality of segregation in this context, for the first time the Court was forced to identify the harm resulting from segregation per se. In one of the most quoted phrases from Brown, the Court said, "[t]o separate [African-American youth] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The Court went on to quote approvingly from the district court in Kansas:

Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn.

115. The Court's opinion in Brown was preceded by four cases addressing segregation in graduate and professional education. The Court cases addressing segregation in graduate and professional schools were actually preceded by Pearson v. Murray, 182 A. 590 (Md. 1936). Donald Murray, an African-American graduate of Amherst College, applied to the University of Maryland Law School, which denied him admission because of his race. Id. at 590. While Maryland did not provide any legal training for African-Americans, it quickly appropriated $10,000 to fund an out-of-state scholarship program. Id. at 593. The Maryland Court of Appeals ruled that the program was insufficient to provide Murray with equal educational opportunities. Id.
116. In Brown, the Court mentioned that its decisions in Sweatt and McLaurin also rested on the recognition of intangibles. Brown, 347 U.S. at 494. Yet in Sweatt v. Painter, the Court also focused on the objectively measurable differences between the University of Texas Law School and the Texas Law School for Negroes. See 339 U.S. 629, 632-34 (1950). At the time Sweatt applied, no law school existed in Texas that admitted African-Americans. Id. at 631. While Sweatt's appeal was pending, however, the Texas legislature appropriated enough money to establish a law school for African-Americans. Id. at 632; Kluger, supra note 58, at 261. In comparing the newly created Texas Law School of Negroes with the University of Texas Law School, the Court noted that the University of Texas Law School had a student body of 850 students, a library with over 65,000 volumes, and a faculty of sixteen full-time and three part-time professors. Sweatt, 339 U.S. at 632. Also available at the University of Texas Law School were a "law review, moot court facilities ... and Order of the Coif affiliation." Id. at 632-33. In contrast, by the time the case reached the Supreme Court, the law school for African-Americans had only twenty-three students, a faculty of five full-time professors, and a library of approximately 16,500 volumes. Id. at 633.
117. Id. at 494.
Segregation with the sanction of law, therefore, has a tendency to retard the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial integrated school system. 118

To support his conclusion that segregation generated the psychological impact on blacks, Chief Justice Warren’s opinion cited studies by social scientists in his now (in)famous footnote 11. Prominent social scientists also filed an amicus brief with the Court in opposition to school segregation:

[T]he opinion stated by a large majority (90 percent) of social scientists who replied to a questionnaire concerning the probable effects of enforced segregation under conditions of equal facilities [is] . . . that, regardless of the facilities which are provided, enforced segregation is psychologically detrimental to the members of the segregated group [here, the blacks].

The available scientific evidence indicates that much, perhaps all, of the observable differences among various racial and national groups may be adequately explained in terms of environmental differences. 119

In its school desegregation jurisprudence, the Supreme Court never repudiated its statement that the fundamental harm derived from segregation was the fact that it made blacks inferior. For example, in the 1968 decision in Green v. County School Board of New Kent County, the Court placed the obligation upon school boards to affirmatively mix the races in public schools and do it now. 120 In justifying this obligation, the Court stated only that the constitutional rights of African-American school children noted in Brown required it. 121 In its 1977 decision in Milliken v. Bradley the Court approved the ordering of educational remedies to combat the effects of de jure segregated schools when it was not possible to integrate the students because of a shortage of white students in the Detroit public schools. 122

In justifying these remedies the Court stated that

[c]hildren who have been . . . educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . .

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118. Id. at 494 (internal quotations omitted) (alterations in original).
121. Id. at 435-36.
Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger . . . . 123

Thus, the Court's reasoning in approving educational remedies in de jure segregated schools rested upon the belief that racial isolation had damaged and would continue to damage only African-American children. Finally, the Court's second school desegregation termination opinion, delivered in the 1992 case of *Freeman v. Pitts*, reaffirmed the idea that the principal harm of segregation was the psychological damage inflicted on blacks. 124 In discussing the harm which remedies for the operation of a dual school system were directed at curing, Justice Kennedy's opinion for the Court quoted the above mentioned passages from *Brown* 125.

Looking back at the Court's school desegregation jurisprudence from the emotionless perspective that comes with the passage of fifty years from the Court's opinion in *Brown* leads to an obvious realization. The Court declared from the summit of judicial reasoning for all Americans to accept as a proven constitutional fact that segregation had retarded the educational and mental development of black people in ways unlikely to ever be undone. 126 Whether as an empirical matter this was true in 1954 (a point that has been contested by later psychological research), 127 the important point to note is that the psychological harm the Court recognized as being generated by segregation was visited only upon African-Americans. This rationale created the impression that blacks were actually made inferior by this country's history of oppression. Thus, desegregation was needed not in spite of, but because of, the inferiority of blacks.

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123. *Id.* at 287.
127. The research by the psychologist purporting to show that African-Americans in public schools had lower self-esteem has been strenuously criticized. *See*, e.g., WILLIAM E. CROSS, JR., SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY (1991) (arguing that the psychologist in *Brown v. Board of Education* confused racial group preference with self-esteem, assuming that racial group preference would automatically correspond with self-esteem; Cross goes on to note that direct measures of self-esteem developed in the 1960s lead to the conclusion that blacks did not suffer from low self-esteem even in 1954.)
IV. ARE THE RACIAL GAPS IN STANDARDIZED TESTS USED TO DETERMINE ADMISSIONS TO SELECTIVE COLLEGES, UNIVERSITIES, AND GRADUATE PROGRAMS A PERPETUATION OF THE PAST JUSTIFICATIONS FOR RACIAL DIFFERENCES?

To scholars of today, we wonder how earlier societies could have been so naive as to accept as evidence of racial differences the contrivances of the past. No scholar today would argue that a glass ceiling to advancement of blacks makes sense because they are victims of a divine curse and therefore their fate is to be servants for the rest of mankind. Anyone who today states that black skin inevitably marks a person as one who is crafty, indolent, negligent, and governed by caprice is viewed derogatorily as a pure racist. In the online site of Encyclopædia Britannica the word “Negro” is defined as “sometimes offensive: a member of the black race distinguished from members of other races by usually inherited physical and physiological characteristics without regard to language or culture; especially: a member of a people belonging to the African branch of the black race.”

Society has also advanced to the point where it recognizes that just because someone has a big head it doesn’t mean that they are intelligent. The dramatic advances that African-Americans have made in the past fifty years clearly debunk the evolutionary theories of the Social Darwinists of the latter portion of the nineteenth century. Despite the assertion by the authors of The Bell Curve, few scholars continue to believe that differences in intelligence between the races are the result of permanent, innate, and in-born differences.

In addition, as we move into the Post-Desegregation Era, we have seen educational reform movements that have discussed the benefits of multiculturalism and diversity. These educational reform movements tend to espouse the notion embraced by Justice O’Connor in upholding the University of Michigan Law School’s affirmative action plan. Racial and ethnic diversity is needed because it helps all students, not just underrepresented minorities with a history of discrimination.

However, significant racial/ethnic gaps on standardized tests used to determine admissions to selective colleges and universities do exist. The historical review of the presumably objective and neutral evidence

to establish racial differences raises questions regarding the objective and racially and ethnically neutral basis of our use of standardized tests. Is our society still engaged in the same sophistry that has plagued Western societies for the past 500 years? Are the standardized tests that reveal presumably racial and ethnic differences in academic preparedness merely the latest chapter in the long book of presumably objective and race-neutral methods to measure racial and ethnic differences to which more enlightened generations will come to scoff at? Will the judgment of history also be one that openly criticizes the stupidity of our present attempts to assert that we have proven such racial and ethnic differences?

Justia's dissenting opinion in the 1974 case, *Defunis v. Odegard*, the first affirmative action case in higher education to reach the United States Supreme Court, points to a view about standardized tests that might be necessary in order to finally cut the Gordian Knot of justifications for the continued oppression of people of color. Marco DeFunis, a white man, challenged the affirmative action admissions program being used at the University of Washington Law School. DeFunis brought his equal protection challenge in Washington state courts on his own behalf and not as the representative of any class. The trial court agreed with DeFunis' challenge and issued an injunction that allowed him to enroll in the Law School. On appeal, the Washington Supreme Court reversed the judgment of the trial court, holding that the Law School's admissions policy was constitutional. By that time, DeFunis was in his second year at the Law School. He then petitioned the United States Supreme Court. Justice Douglas, as Circuit Justice, stayed the judgment of the Washington Supreme Court pending the final disposition of the case by the United States Supreme Court. By the time the Court heard oral arguments in the case, DeFunis was in his last term at the Law School. A majority of the justices decided to dismiss the case as moot. Four of the nine Justices dissented from the determination that the case was moot. They felt that the Court

131. *Id.* at 314.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 319-20.
should address the issue, in part, because of its national importance. Justice Douglas also wrote a separate dissenting opinion.  

Justice Douglas noted that the psychological harm of America’s history of racial oppression had a dual nature. “The years of slavery did more than retard the progress of blacks. Even a greater wrong was done the whites by creating arrogance, instead of humility and by encouraging the growth of the fiction of a superior race.” Douglas noted in his opinion that those who make the LSAT and law schools that use it point to a correlation between the test scores and first year grades. He acknowledged that the test did seem to do better than chance at such predictions. Nevertheless, Douglas noted:

“The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States.” The Law School’s admissions policy cannot be reconciled with that purpose, unless cultural standards of a diverse rather than a homogenous society are taken into account. 

The key to the problem is the consideration of each application in a racially neutral way. Since the LSAT reflects questions touching on cultural backgrounds, the Admissions Committee acted properly in my view in setting minority applications apart for separate processing. These minorities have cultural backgrounds that are vastly different from . . . dominant Caucasian[s].

. . . [A]t least as respects Indians, blacks, and Chicanos—as well as those from Asian cultures—I think a separate classification of these applicants is warranted, lest race be a subtle force in eliminating minority members because of cultural differences.

It is important not to overstate the racial/ethnic gaps on standardized tests used to determine admissions to selective colleges, universities, and graduate programs. Standardized tests are used to measure the differences between people that take them. If ninety-nine percent of the knowledge and understanding among people is the same, then this ninety-nine percent would be excluded for purposes of standardized tests because it would tell us nothing about how those who take the test differ from one another. Thus, standardized tests tend to overstate racial and ethnic differences. But if the average lived experiences of African-Americans and other underrepresented

138. Id. at 320 (Douglas, J., dissenting).
139. Id. at 336 (Douglas, J., dissenting).
140. Id. at 328 (Douglas, J., dissenting).
141. See id. at 329 (Douglas, J., dissenting).
142. Id. at 334-35 (Douglas, J., dissenting).
minorities with a history of discrimination in this society are only slightly dissimilar from that of non-Hispanic whites, that slight dissimilarity will translate into huge divergences at the upper end of the range of scores on standardized tests. Justice O'Connor's opinion recognized that the unique experience of being a racial minority in a society where race unfortunately still matters will effect a person's views. Implicit in this recognition is the alternative explanation that some (most? all?) of the racial gap in performance on standardized tests used to determine admissions to selective colleges, universities, and graduate schools relates to an embedded cultural bias of the exam as opposed to any deficiency on the part of such underrepresented minorities.

As Justice Douglas's opinion suggests, to assume that the test scores of non-Hispanic whites could be compared to racial/ethnic groups with a history of discrimination may work to protect a bias in favor of non-Hispanic whites. It has become common fare for whites denied admission to selective colleges, universities, or graduate programs to assert that if they had been black, their test scores would have been good enough for admission to the program of their choice. But for this counterfactual hypothetical to be true, it requires an assertion that race does not matter in American society.

Because of the undeniable impact of race and racism that is still an aspect of everyday American life, the entire life of the transmuted would-be applicant who grew up black, Latino or Native American instead of white would have been different. Part of that difference, on average, would no doubt translate into lower test scores on standardized tests like the LSAT. In the same way, the black or other underrepresented minorities from a group with a history of discrimination who instead grew up white in America would have lived an entirely different life as well. No doubt, on average, part of that difference would be increased standardized test scores. Simply put, because of the existence of the history of racial and ethnic oppression in our country it may not be possible to develop a culturally neutral standardized test in which the score of a non-Hispanic white can be equated with that of a black, Latino, or Native American.

V. CONCLUSION

The Supreme Court agreed to uphold the affirmative action program used by the University of Michigan Law School in Grutter v. Bollinger. Implicit in the Court's opinion, however, is the idea that the benefits derived from inclusion of a critical mass of underrepresented
minorities with a history of discrimination outweighs their academic deficits. My primary purpose in this Article has been to raise the question of whether our belief in the objective ability of standardized tests used to determine admissions to selective colleges, universities, and graduate programs is not just the latest chapter in the long history of Western society's generations of rationalizations for the continued oppression of people of color, especially African-Americans.

Throughout the centuries presumably objective and racially neutral evidence has been amassed to demonstrate the fact that blacks and other minority groups are in some way inferior to Caucasions. Presumably objective and racially neutral evidence of the revealed reality of the lesser nature of blacks from the past has included a belief that blacks were the victims of a divine curse placed upon human flesh; a belief that black skin was an aberrant development caused by being subjected to the inhospitable climates of Africa; a belief that intelligence could be determined based on the angle of the face or the shape of the head, and that blacks facial angles or head shapes were manifestation of a substandard nature; a belief that cerebral capacity bore a relationship to intelligence, and because the brains of blacks were smaller than those of whites, they were less intelligent. This leads to the question: Are racial and ethnic differences on standardized tests used to determine admissions to selective colleges and universities merely the latest chapter in the long history of evidence about racial differences that will be discarded as folly by later, more enlightened generations?