Diversity Blues: The Lack of Racial Justice Within the Race-Conscious Admissions Debate

Christopher S. Arlene, McNair Scholar, Pennsylvania State University

Faculty Research Advisers
Dr. Susan Searls-Giroux
Senior Lecturer in English and Education

Dr. Henry Giroux
Waterbury Chair Professor in Secondary Education
Pennsylvania State University

Introduction

Within the debate on the legality of affirmative action in America, these have indeed been interesting times. The Supreme Court recently found that the affirmative action policies being used in the admissions process by the University of Michigan Law School to be constitutional. In doing so the Court, in a 5-4 decision, gave powerful legal support to the goal of campus diversity that was first made prominent by Justice Lewis Powell in *Regents of the University of California v. Bakke* (1978). And while the Court shot down the mechanical system of giving Black, Latino, and Native American applicants twenty points on a 150-point scale at the undergraduate level, the decisions have largely been viewed as victories for racial inclusion.[1]

But, unfortunately, the decisions handed down by the Court will not have the enormous effects that many supporters of affirmative action believe that they should.[2] The reason for this lays in the fact that, however important the decisions in the Michigan cases may be, the commitment to diversity being promoted at the college level as reasoning for the decisions lacks one critical ingredient: a true commitment to racial justice. The ideals of racial equality, an attempt to legitimately equalize a playing field that heavily favors Whites and strongly discriminates against Blacks, Latinos, and Native Americans, have been almost entirely ignored within the debate concerning race-conscious admissions policies.

The lack of discussion concerning the need for racial justice in this particular debate is extremely troubling for a number of reasons, but most importantly because the ultimate desire for racial equality seems nonexistent within mainstream public debates. And as long as this is the case, then the victory for the University of Michigan is really nothing more than powerless window dressing that allows us to continue our silence concerning the real issue behind the affirmative action debate: past and present racial discrimination. Until we begin to talk about past and present discrimination against people of color, then we will never be able to publicly deal with the deeper issues that require race-conscious admissions policies to be necessary.

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[1] Schmidt, Peter. "Affirmative Action Survives, and So Does the Debate," *The Chronicle of Higher Education*. July 2003: S1.

[2] Washington, Wayne & Globe Staff. "Supporters of Affirmative Action Are Pleasantly Surprised," *The Boston Globe*. 24 June. 2003: A13.

I want to focus on two specific reasons why the decisions by the Court should not be looked at as historic, or as a step forward in the journey for racial equality, or even as an assurance that minority students will continue to have access to higher education. The reasons for this current state of affairs exemplify a number of different institutional problems that plague most minorities in this country, and they should be examined as being important elements of a social system based on discrimination and disadvantage.

First, supporters of diversity on America's college campuses include some of the most influential political, business, and military leaders in the nation, and one would be hard pressed to find anyone who feels that diversity is not an enviable goal. But, nowhere in the argument for supporting race-conscious admissions policies is the idea that American society's discriminatory tendencies must be talked about and solved.

The diversity rationale is primarily based on the idea that we live in a multiracial, multicultural society, and that because of this we must be able to learn about and work with each other.[3] There is the acknowledgement that Black, Latino, and Native American people have been discriminated against in the past, but such abuses have been rectified. For the purposes of securing another twenty-five years of affirmative action policies, those in the public debate are willing to forget that we not only have to make up for a discriminatory past, but also an extremely discriminatory present.

Second, the celebrated 1954 *Brown v. Board of Education* decision that found segregated education illegal and forced integration in America's public schools has been, for the most part, repealed by a number of Supreme Court decisions in the last thirty years. Due to a number of important decisions made by the Court in the early 1970's and the 1990's, we are currently faced with an American public school system that is once again based on an unequal form of segregation.[4] The current state of public education is eerily reminiscent of a time when "separate but equal" was a legally supported social idea.

While there is obviously truth to the idea that a diverse student body is a worthwhile goal for any institution of higher learning, the segregation of K-12 education in this country has created the unfortunate situation where most students do not have experience going to school with students of different races. And the implications of this situation are quite serious because segregation leaves minority students seriously disadvantaged in comparison to White students in regards to the quality of their education. For example, Black students consistently score lower than White students on assessment tests throughout elementary and secondary school.[5]

Segregation in America's schools forces most Black and Latino students to attend inferior schools because informal segregation is a function of both race and class politics. Since schools that are intensely Black and Latino are fourteen times as likely to be high poverty schools than schools with 90% White students,[6] the overlap between race and class cannot be overlooked. As Gray Orfield, Co-Director of the Civil Rights Project at

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[3] "Right Ruling, Wrong Reason." Editorial. *The Washington Post* 29 June. 2003: B3.
[4] Orfield, Gary. *Dismantling Desegregation: The Quiet Reversal of Brown v. Board of Education*. New York: The New Press, 1996. 1.
[5] National Center for Education Statistics. "Educational Achievement and Black-White Inequality." July 2001. 60. <http://nces.ed.gov/pubs2001/2001061.PDF>.
[6] Orfield, 55

Harvard University, clearly explains this problem in his book *Dismantling Desegreation* when he writes:

> The intense segregation of minority and low-income students in urban schools is a critical factor in analyzing educational opportunity because it is systematically connected to patterns of low achievement. In virtually every large metropolitan area studied that lacks city-suburban desegregation, low-income minority students and middle-class white students attend schools tat are not only separate, but profoundly unequal.[7]

Tragically, given such conditions, the role of education will only grow more important as we move into an economy based on technological expertise and information. While in the past education certainly did separate those who had and those who had not, there was still an important and meaningful role for workers who were not highly educated, but that is not the case anymore.

The reality of the situation is that earning an undergraduate degree no longer ensures the same amount of material success and opportunity for upward mobility that it once did,[8] and as post-graduate education becomes a necessity poor minority students find themselves at an even deeper disadvantage. For example, in 1999 the average annual income for a college graduate was $45,400, while just $25,900 for high school graduates and $18,900 for high school dropouts.[9] As long as most minority students are subjugated to schools that do not prepare them for academic or economic success many of the current inequalities related educational achievement, employment, and income will continue.

The role of the judiciary also plays an important role within this discussion, because the precedent that has been set by the Supreme Court, and generally followed by the lower courts, is one that has all but eliminated the courts as a place where disadvantaged minorities can attempt to solve problems of educational inequity. The publicity brought about by the Michigan decisions was largely positive for liberal supporters of affirmative action, although some conservatives have claimed the decisions as victories as well.[10] But, however promoted by the media, the Court's decision has to be taken with a grain of salt and examined within the context of its past decisions. The reversal of *Brown* shows the true colors of the very conservative Rhenquist Court, and the decisions in the Michigan cases should be understood within this context.

Ultimately, the decisions will not have any real effect towards the promotion of racial equality and justice as ideals at the university, as well as on the enrollment of minority students at our most prestigious colleges and universities. While the Court gave legal approval for the attainment of a culturally and racially diverse student body through the use of affirmative action policies, the Michigan decisions in no way ensure equality in education, equality in opportunity, or commitment to fixing our deeply rooted racial problems. And on the eve of *Brown's* 50th anniversary, it seems that we are still

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[7] Orfield, 65

[8] National Alliance of Business. "Workforce Economics Trends." May 2000. Retrieved on September 29, 2003 from <http://www.nab.com/PDF/wft_may2000.pdf>.

[9] U.S. Census Bureau, 2002, retrieved on September 23, 2003 from http://www.csun.edu/~hfoao102/@csun.edu/csun02-03/csun1007_02/census.html.

[10] Kahlenberg, Richard. "The Conservative Victory in *Grutter* and *Gratz*." *Jurist: The Legal Information Network*. 5 Sep. 2003. <http://jurist.law.pitt.edu/forum/symposium-aa/kahlenberg.php>.

searching for answers on how to implement the most fundamental and necessary step in the journey for equality: equal access to a quality education.

Historical Background: The Bakke Decision

The cases against the University of Michigan cannot thoroughly be understood without situating them within the history of affirmative action policies in the realm of college admissions. And there has been no more important case in the legal history of this issue than that of the *Board of Regents of the University of California v. Bakke*. The historical Supreme Court decision dealt with a white student, Allan Bakke, who applied multiple times to the University of California-Davis Medical School and was repeatedly denied admission despite outstanding grades and standardized test scores. He argued that because the University was setting aside a fixed amount of openings for its incoming class for racial minorities that he was being unfairly discriminated against because of his race.[11]

The Court's decision in *Bakke* was not unanimous, decisive, or even clear, and it is because of the lack of clarity in the Court's decision that the issue of using race in the admissions process is once again being brought before the Court. The nine-member Court found itself split, with four Justices finding that race can legally be considered in the admissions process, while four other Justices found that the quota system used by the University violated Title VI of the Civil Rights Act of 1964. So with the Court split, Justice Lewis Powell became the deciding vote, and his interpretation of the legality of the program has set the standard for affirmative action in college admissions up to this point.[12]

Justice Powell believed that the system of set-asides used by the University was indeed a violation of the Civil Rights Act of 1964 and therefore ordered that Bakke be admitted to the University. But, he also found that race can indeed be a factor in the admissions process, officially ruling 5-4 in favor of the University. In his majority opinion Justice Powell wrote that student body diversity "clearly is a constitutionally permissible goal for an institution of higher education,"[13] essentially making it legal for colleges and universities to use affirmative action.

What the decision left the academic world with is the idea that student diversity is an important and worthwhile goal, but at the same time quota systems were found illegal. Therefore race was supposed to be only one of many different factors considered in the admissions process.[14] Race cannot legally be used in the mechanical way that the quota system at the University was used, but when looking at an individual applicant race can be considered amongst other criteria, such as academic potential, economic background, and community service.[15]

It is basically within this context that the Michigan cases are debated, because the *Bakke* decision was the basis for most prestigious institutions of higher education to

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[11] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
[12]Spann, Girardeau A. *The Law of Affirmative Action: Twenty-Five Years of Supreme Court Decision on Race and Remedies*. New York University Press, 2000. 17.
[13] 438 U.S. 265 (1978).
[14] Wightman, Linda. "Standardized Testing and Equal Access: A Tutorial," *Compelling Interest: Examining Evidence on Racial Dynamics in Colleges and Universities*. Eds. Mitchell J. Chang, et. al. Stanford University Press, 2003.
[15] Girardeau, 16.

implement affirmative action policies. While the decision did not necessarily create a road map or a strict set of guidelines for using affirmative action in the admissions process, it did give colleges and universities across the country the ability to create diversity of in the student population. And ultimately, the basis for the Michigan cases is that the plaintiffs felt that the University's individual system for creating diversity was unfair and illegal.

The Michigan Decisions

The University of Michigan is, without question, one of America's most repubutable and elite institutions of higher education. The elite status of many of its schools and departments, both for undergraduate and graduate programs, has clearly situated the University with other elite public universities, such as the University of California-Berkeley, the University of North Carolina-Chapel Hill, and the University of Virginia. And it is because of the University's growing prominence as a superior academic institution that the complaints filed against the University in the fall of 1997 were so serious in nature.

Barbara Grutter, a White woman who was denied admission to the University's Law School (Law School), filed a lawsuit, *Grutter v. Bollinger, et. al*., against the University that claimed that she was unfairly denied admission because she was White.[16] Jennifer Gratz and Patrick Hamacher, White applicants who were denied admission to the University's flagship undergraduate college, the College of Literature and the Sciences and the Arts (LSA), also filed a suit against the University, *Gratz, et. al. v. Bollinger, et. al*., claiming that they had been denied admission because they were White, which is a violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.[17]

The basis for the plaintiff's claims in these two cases rested in the University's race-conscious admission policies. The University, as most other national universities do, used affirmative action policies during its admissions process, with the ultimate goal of creating a racially and ethnically diverse student body.[18] Due to the magnitude of applicants the University receives for its undergraduate program, usually over 25,000 applications for 5,000 spaces, it used a 150-point system to judge applicants. After examining characteristics such as grade-point-average, SAT/ACT scores, community service experience, extracurricular activities, and many others, if an applicant scored 100 points he or she was offered admission.

The fatal flaw of the undergraduate program's point system rested in the fact that members of specified underrepresented racial and ethnic groups, in this instance Black, Latino, and Native Americans, were automatically given twenty points. The argument against this aspect of the point system was grounded in the idea that minority applicants were receiving an unfair and undeserved advantage in the admissions process over their White counterparts.[19] And while the Law School did not use a point system for its admissions process, instead being able to utilize a more holistic admissions review, it

[16] *Grutter v. Bollinger, et al*. 28 U.S.C. (1997).
[17] *Gratz, et al. v. Bollinger, et al*. 28 U.S.C. (1997).
[18] *Gratz, et al. v. Bollinger, et a*l. U.S. 02-516 (2003).
[19] *Gratz,* U.S. 02-516 (2003).

openly used affirmative action policies to foster the racial and ethnic diversity in its student body that the University believed was a "compelling state interest."[20]

The cases eventually made their way to the Supreme Court, and the legality of student body diversity as a "compelling state interest" is what the Court eventually based their "monumental" decision on. The Court, in what was generally hailed by supporters of affirmative action as a significant victory, ruled in favor of the Law School and against LSA. In a 5-4 decision with Justice Sandra Day O'Connor as the swing vote, the Court found that diversity was indeed a compelling state interest, and that the Law School's admission process, based in a more holistic overview of applicants, did not violate the Equal Protection Clause.[21] In a 6-3 decision, though, the Court ruled against LSA because its mechanical point system was "not narrowly tailored" enough to survive strict scrutiny,[22] meaning that blindly giving any applicant one-fifth of the points needed for admission simply because he or she is an underrepresented minority is unconstitutional.

While the decisions may mean different things depending on whose side one is on, the Court's rulings have some very concrete answers to questions that had been plaguing higher education ever since the *Bakke* decision. That decision, in which Justice Powell stated that the "diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element,"[23] is the basis for the adoption of non-quota affirmative action policies by the University, and higher education in general.

First, the Court's deciding in favor of the Law School gives new legal strength to the *Bakke* decision, and essentially gives legality to fostering diversity at the university level through the use of race-conscious affirmative action policies. The plaintiff's argument in both instances was based on the idea that diversity, certainly a worthwhile goal, is not such an important governmental interest that it warrants the use of, as conservative opponents would argue, "reverse discrimination." But as Justice O'Connor phrased it in her majority opinion, "education. . . must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America."[24]

Second, just as Justice Powell dictated in *Bakke*, race can certainly be examined and considered during the admissions process, but it has to be examined along with other important applicant characteristics. This is why the undergraduate program was shot down, because the point system did not look at race as an equal factor in the admissions process. What this means for admissions offices across the country, especially at other flagship state universities such as the University of Texas-Austin and the Pennsylvania State University-University Park, is that they must somehow figure out how to expand their staffs in order to ensure the holistic judgment the Court is requiring.

Third, the Court does not view affirmative action policies as the ultimate answer for creating diversity at the university level, and it set a twenty-five year limit for the continuation of race-conscious policies. As Justice O'Connor wrote, it "has been 25

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[20] *Grutter v. Bollinger, et al*. U.S. 02-241 (2003).
[21] *Grutter v. Bollinger, et al*. 539 U.S. 02-241 (2003).
[22] *Gratz et al. v. Bollinger, et al*. 539 U.S. 02-516 (2003).
[23] *Regents*, 438 U.S. 265 (1978).
[24] *Grutter*, 539 U.S. 02-241 (2003).

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. . . We expect that 25 years from now, the use of racial preferences will no longer be necessary. . ."[25] With this stipulation attached to its decision, the Court has made it clear that affirmative action policies cannot be counted on in the future to ensure minority access to higher education.

The decisions in the cases against the University of Michigan will undoubtedly be considered in the same company with the likes of *Bakke* and *Brown* in the realm of American legal history. Just as the *Brown* case found separate but equal public education unconstitutional, the Michigan cases will probably be viewed as similarly significant in the effort towards ensuring minority access to important social institutions like higher education, and supporters of affirmative action have already claimed the Court's decision as a decisive victory.[26]

But while the Court's ruling should be seen as good news for supporters of race-conscious policies, it should not be viewed as a colossal victory for minority students in America. While the decision gives the appears to ensure minority access to our nation's prominent colleges and universities, there are two primary reasons why this appearance is little more than an misleading façade: the lack of a true commitment to diversity for the purposes of racial justice and the savagely unequal public education system due to a reversal of the Brown decision.

The Role of Diversity

The most prominent and powerful argument supporting the University of Michigan's race-conscious admissions policies was the importance of campus diversity, the creation of a mix of students with many different backgrounds with emphasis put on, but certainly not limited to, racial and ethnic heritage. The University used this strategy in the lawsuits against the admissions policies at both the Law School and LSA, and in the end the Court agreed with this argument, although not with the "mechanical" point system used in the undergraduate process.

Justice O'Connor wrote in her majority opinion that the University "has a compelling interest in attaining a diverse student body" and that "effective participation by members of all racial and ethnic groups . . . is essential."[27] So the Court clearly believes that America's diversity is not something that should simply be acknowledged, but rather that it should be embraced. And the Court is certainly not alone in supporting the magnitude of diversity as a new direction for our nation. Even President George W. Bush, who vehemently opposes affirmative action and spoke out against the University, stated that "diversity is one of America's great strengths."[28]

Two very powerful briefs were filed in support of the University, one signed by officers of major Fortune 500 companies and the other filed on behalf of a number of prominent retired military officers, that exemplify the genuine desire to incorporate diversity into society's most influential social institutions. Leaders of corporations such

[25] *Grutter*, 539 U.S. 02-241 (2003).
[26] Liptak, Adam. "Affirmative Action Proponents Get the Nod in a Split Decision," *New York Times*. 24 June. 2003: A26.
[27] *Grutter*, 539 U.S. 02-241 (2003).
[28] Bush, George W. "Statement by the President." Online Posting. 23 June. 2003. <http://www.whitehouse.gov/news/releases/2003/06/20030623.html>.

as Microsoft, Boeing, General Electric, and Proctor & Gamble endorse the idea that in order for students to "realize their potential as leaders, it is essential that they be educated in an environment where they are exposed to diverse people, ideas, perspectives, and interactions."[29] And former military leaders such as Gen. H. Norman Schwarzkopf argue that "a highly qualified, racially diverse officer corps educated and trained to command our nation's racially diverse enlisted ranks is essential."[30]

Most importantly, though, diversity is clearly and powerfully supported in the academic world of higher education for its personal and societal benefits. The educational benefits of diversity are based in the realization that we live in a country, and more importantly a global economy, that is racially, ethnically, and culturally diverse, and because of this fact the importance for cross-cultural communication skills, the ability to work with different types of people, and the breaking-down of stereotypes is essential for all future employees.[31] And, according to an expert report filed in support of the University by professor Patricia Gurin, diversity benefits all students because they "learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting."[32]

So, it seems that the importance and value of diversity in higher education is not something that can legitimately be argued against. Walter Feinberg explains the overall acceptance of diversity as a national virtue in his book *On Higher Ground* when he argues that "diversity appeals to certain conceptions of fairness and equity without appearing to blame the living members of one group for the historical misfortunes or injustices of another."[33] Diversity, the catch phrase that has no single definition, has therefore become an important aspect of the modern collegiate experience, especially for the white students who, for the overwhelmingly majority, do not have much experience going to class with minorities upon arriving on campus.[34]

But it is here where the first glimpse of the falsehoods of diversity, and its sister catch-phrase "multiculturalism," can be seen: the notion of diversity that supports affirmative action at the university level, an acceptance of multiculturalism as important and necessary, is not genuine at its core and does not care to legitimize the students or the subjects that it should be equalizing. This form of multiculturalism does not, in the words of scholar Henry Giroux, "address how material relations of power work to sustain structures of inequality and exploitation in the current racialization of the social order.[35] It is more centered around the acknowledgement of different races and different cultures, rather than focused on examining social problems of inequity and discrimination.

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[29] Amicus Brief, "65 Leading Businesses in Support of Respondents," *Gratz, et. al. v. Bollinger, et. al* U.S. 02-241 (2003) and *Grutter v. Bollinger, et. al.* U.S. 02-516 (2003).
[30] Amicus Brief, "Consolidated Brief of Lt. Gen. Julius W. Becton, Jr., et. al. in Support of Respondents" *Gratz, et. al. v. Bollinger, et. al* U.S. 02-241 (2003) and *Grutter v. Bollinger, et. al.* U.S. 02-516 (2003).
[31] Milem, Jeffrey F. "The Educational Benefits of Diversity: Evidence From Multiple Sectors," *Compelling Interest*, Eds. Chang, et. al. 2003. 152.
[32] "The Compelling Need for Diversity in Higher Education," Gratz, et. al. v. Bollinger, et. al. 97-75231 (E.D. Mich.) and Grutter v. Bollinger, et. al. 97-75928 (E.D. Mich.). Jan. 1999. Copyright by the Regents of the University of Michigan.
[33] Feinberg, Walter. *On Higher Ground: Education and the Case for Affirmative Action*. Teachers College Press, Columbia University, 1998. 76.
[34] Frankenburg, Erica, Lee, Chungmei, and Orfield, Gary, "A Multiracial Society with Segregated Schools: Are We Losing the Dream?" The Civil Rights Project, Harvard University. Jan. 2003. 27.
[35] Giroux, Henry. *Impure Acts: The Practical Politics of Cultural Studies*. Routledge, 2000. 74.

The incorporation of multiculturalism does not rest in the inherent desire to realize that Black, Latino, and Native American students, and the cultural legacy associated with their unique ethnic and racial experiences, are equal to their White counterparts. But instead, it rests in the belief that diversity is an essential aspect of the educational experience in order to prepare future employees, as opposed to molding critical citizens who are committed to democratic values of equality and social justice. Because the current role of the university is to prepare students with the tools that the corporate world requires, diversity is now promoted universally as an important part of the college experience. Many universities are very clear about their need to help students by fostering "the type of cross-cultural experiences that will make them attractive to future employers.[36]

In his collection of essays *Dispatches from the Ebony Tower*, scholar Manning Marable explains the problematic state of ethnic studies within the realm of higher education as diversity is promoted for its moneymaking possibilities. Marable writes:

> In this period of globalization corporate capital requires a multicultural, multinational management and labor force. Racialized ethnic consumer markets in the U.S. represent hundreds of billions of dollars; black Americans along spend more than $350 billion annually. To better exploit these vast consumer markets, capital has developed "corporate multiculturalism," the manipulation of cultural diversity for private profit maximization.[37]

As Marable explains, the push for multiculturalism can most succinctly be understood as an exploitative mechanism for business to extract as much as they can from minority communities. The promotion of learning about and incorporating minorities in the corporate world and the university is therefore rooted in monetary goals, as opposed to the democratic and moral ideals that were evident during the student movements of the 1960's. Therefore, corporate multiculturalism works to both use minorities in the workforce and to educate White employees on how to better tap minority resources. Once again Feinberg clearly explains the thinking behind corporate America's strong support for affirmative action when he writes that in "an age when the cultural and ethnic character of American society is undergoing remarkable changes and when the marketplace is the world itself, surely it makes sense in many instances to diversify the work force."[38]

What is lost when diversity is presented in terms of its corporate possibilities is the desire to address our ongoing and deep-rooted racial problems. The general absence in mainstream politics of concerns for racial equality and racial justice shows the true colors of the diversity rationale that has largely been promoted, and the Court's opinions in the Michigan cases exemplify this problem. Only Justice Ruth Bader Ginsburg seems to acknowledge the problems of racial inequality as primarily important, as she writes that "conscious and unconscious race bias, even rank discrimination based on race, remain

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[36] "A Framework to Foster Diversity at Penn State: 1998 – 2003," The Pennsylvania State University, retrieved on September 25, 2003 from <http//www.equity.psu.edu/Framework/understand.html>.
[37] Marable, Manning. "The Problematics of Ethnic Studies," *Dispatches from the Ebony Tower: Intellectuals Confront the African American Experience*. Ed. Manning Marable. New York: Columbia University Press, 2000. 261.
[38] Feinberg, 77.

alive in our land."[39] While Justice Ginsburg does not argue against the ideals of diversity, she does raise the crucial point that the importance of the decisions should not be wholly seen through the lens of diversity.

It is here where another fundamental flaw of the diversity rationale must be examined: the promotion of colorblindness as the ultimate goal for an American society that since its inception has been plagued by racial discrimination and inequality. With the twenty-five year limit for the continuation of race-conscious admissions policies that it set, the Court made it clear that it believes America is working towards a day when racial preferences will no longer be necessary. And though colorblindness and diversity appear to be different, they work together to hinder the cause of racial justice because both ideologies allow us to leave the problems of deeply rooted institutional racial discrimination unaddressed.

Within the affirmative action debate, the promotion of colorblindness is quite often a powerful tool for many conservatives. Based on the principle that all Americans should not be given any type of preferential treatment based on race, colorblind ideology appeals to the deep-rooted American tradition of equal opportunity (even though that tradition has never been universally applied). It is quite common to see conservative proponents of colorblindness appeal to Martin Luther King, Jr's "I have a dream" speech" and its call for judging all people based on the "content of their character." David Theo Goldberg examines the complexity of colorblindness in his book *The Racial State*, and ultimately he views the colorblind ideology, largely advocated by conservatives, as best serving the interests of white supremacy. While right wing critics such as Curt Levey promote colorblindness as the way to achieve "a fully integrated society in which race does not play a role in a discriminatory way,"[40] Goldberg sees it as a way of maintaining the supremacy of a white culture that is generally thought of as natural and superior to that of any colored person.

First, colorblindness is defined by whiteness in American culture, so just as white Americans are simply known as Americans, as opposed to black Americans being known as African Americans, the state of racelessness that is the eventual goal of colorblind ideology is nothing more than a state of whiteness. As Goldberg puts it, "the racelessness of absorption and transmogrification of the racially differented into a state of values and rationality defined by white standards and norms, ways of knowing and being, thinking and doing."[41]

Second, colorblindness provides a structure for decontextualizing the present state of social inequality faced by brown skinned people throughout American society because it simply refuses to recognize the constant institutional injustices that have created the present state of social, political, and economic inequality. Considering that the net worth of White families is eight times that of Black families and twelve times that of Latino families,[42] that Black Americans owned just 1% of the nation's wealth by 1990,[43] and that in less than twenty years there will be as many Black men in America's jails as were

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[39] *Gratz,* 539 U.S. 02-516 (2003).
[40] Levey, Curt. "Racial Preferences in Admissions: Myths, Harms, and Alternatives," *The Albany Law Review* 66.2 (2003): 490.
[41] Goldberg, David Theo. *The Racial State*. Oxford: Blackwell, 2002. 206
[42] Wolff, Edward N. cited in "A Scholar Who Concentrates... on Concentrations of Wealth," *Too Much*, Winter 1999. 8.
[43] Conley, Dalton. *Being Black, Living in Red*. Berkeley: University of California Press, 1999.

enslaved during the peak of slavery in 1860,[44] the social implications of color have to be examined. The very power in the colorblind argument is that it does not address the issues of the past as they impact the present, which is exactly why it can be promoted as a positive goal that we should all one day hope to achieve, but at the same time it absolutely does not attempt in any way to begin the process of racial justice.

As Goldberg succinctly puts it, colorblindness rests in "the failure of whiteness to recognize itself as a racial color, the implication must be that colorblindness concern itself exclusively with being blind to *people* of color."[45] And it is through this mechanism that colorblindness, coupled with appeals to diversity, can be publicly promoted as an end that will benefit all Americans, but they actually work as nothing more than ways out of dealing with a past and a present that have always, and painfully so, recognized how very different our colors are.

The Reversal of Brown and the Unequal State of American Public Education

It has been almost 50 years since Thurgood Marshall, who later became the first black American Supreme Court Justice as well as cultural and legal icon, argued successfully before the Court in *Brown.* In perhaps the most significant legal decision in the nation's history, a unified Court found that "separate-but-equal" segregation in public education unconstitutional, effectively overturning *Plessy v. Ferguson* (1896), the decision that had been the legal backbone for Jim Crown segregation. The Brown decision was based on the Court's findings that "separate educational facilities are inherently unequal,"[46] and therefore that segregation in public education violated the equal protection clause of the Fourteenth Amendment.[47]

The *Brown* decision of 1954 (*Brown I*) was followed by a 1955 decision in *Brown v. Board of Education* (*Brown II*) where the Court ruled on how to implement desegregation in America's public schools. It was in this aspect of the case where Chief Justice Warren stated that desegregation in America's public schools should happen with "all deliberate speed."[48] The Court, however, issued no specifics on how to implement the massive change, and resistance to the Brown decisions effectively nullified the decisions for more than ten years as most southern schools remained segregated.[49]

But by the mid 1960's, after many techniques for resisting integration had been nullified due to strong efforts through the burgeoning civil rights movement, an era of sizable and genuine change began that would last for over twenty years and would see drastic improvement in the effort to integrate America's schools. Practices such as creating inner-city magnet schools, city-suburban district interaction, and busing were used in order to desegregate schools, and these practices eventually became fairly successful.[50] This is not to say that a specific date or place can be seen as the starting point for similar integration efforts across the country, but rather that the first small steps of any desegregation efforts were taken during this time.

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[44] Boyd, Graham. "Collateral Damage in the War on Drugs." *Villanova Law Review* 2002.
[45] Goldberg, 222-223.
[46] *Brown v. Board of Education*, 347 U.S. 483 (1954).
[47] *Brown*, 347 U.S. 483 (1954).
[48] *Brown v. Board of Education*, 349 U.S. 294 (1955).
[49] Chemerinsky, Erwin. "The Segregation and Resegregation of American Public Education: The Courts' Role." *North Carolina Law Review*, 81 (2003): 1603.
[50] Chemerinsky, 1603.

Though there was progress throughout the 1970's in school integration due to such decisions as *Swann v. Charlotte-Mecklenberg Board of Education* (1971) and *Keyes v. Denver School District No. 1* (1973), there were two decisions that laid the groundwork for the eventual return to segregation: *San Antonio Independent School District v. Rodriguez* (1973) and *Milliken v. Bradley* (1974). In *Rodriguez*, the Court ruled in favor of Texas' school funding schemes based on local property value, and by doing so the Court found that poor students are not a protected class under the Equal Protection Clause.[51] In *Milliken,* the Court overruled a federal district court's ruling that imposed a multi-district strategy to integrate Detroit's mostly Black student population and the almost completely White suburban school districts. The *Milliken* decision made it impossible to create inter-district remedies for segregation unless a constitutional violation in one district affected another district,[52] and considering the very segregated state of most school districts, *Milliken* banned a very powerful strategy for creating integration.

The 1980's saw the pinnacle of success for desegregation efforts, largely due to federally enforced desegregation orders that forced school districts to act. For example, in 1964, 2.3% of Black students in the South attended majority White schools, but by 1988 43.5% did; and by 1988 the average Black student attended a school with 36% White students.[53] But by the 1990's, the progress that had been made in desegregating schools was beginning to fade, largely due to the demographic makeup of Black and Latino inner-city school districts and White suburban districts. The Supreme Court had not heard desegregation cases in over two decades, but when the Court did hear cases in the early 1990's their decisions lessened desegregation orders that had been, up to that point, successful.[54] Basically, the Court ruled that desegregation was a temporary solution, and once a district reached a point where it had integrated enough to reach its federal mandate it no longer has to continue with desegregation efforts.

The decision in *Board of Education v. Dowell* (1991), *Freeman v. Pitts* (1992), and *Missouri v. Jenkins* (1995) have effectively combined to drastically reduce the amount of integration in public schools across the country. In *Dowell*, the Court ruled that once a district that has been under a desegregation order for a lengthy period of time and has taken tangible steps toward remedying its past discrimination, it should be released from its desegregation order.[55] In *Pitts*, the Court ruled that a district court in Georgia could give up control in certain aspects of a desegregation order that was being fulfilled even though other aspects of the order had not yet been achieved.[56] And in the *Jenkins* decision, the Court ended the desegregation order for Kansas City (Mo) public schools even though it had been extremely successful.[57] Once again, Orfield clearly explains the consequences of these decisions:

> Under *Dowell*, *Pitts*, and *Jenkins*, school districts need not prove

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[51] *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).
[52] *Milliken v. Bradley*, 418 U.S. 717 (1974).
[53] Frankenburg, Lee, and Orfield, 37.
[54] Orfiled, Gary. "Schools More Separate: Consequences of a Decade of Resegregation." The Civil Rights Project, Harvard University. July 2001. 16.
[55] Davis, Abraham and Graham, Barbara. *The Supreme Court, Race, and Civil Rights*. Sage Publications, 1995. 360.
[56] Davis and Graham, 361.
[57] Chemerinsky, 1617.

> actual racial equality, nor a narrowing of academic gaps between the races. Desegregation remedies can even be removed when achievement gaps between the races have widened, or even if a district has never fully implemented an effective desegregation plan. Formalistic compliance for a time with some limited requirements was enough, even if the roots of racial inequality were untouched.[58]

All in all, the decisions of the Court both in the 1970's and the 1990's have created a situation where it is almost impossible to implement effective desegregation plans, and many districts that had at one time made progress when under federal supervision have now reverted back to segregation once out of federal control. The lower courts have followed the lead of the Supreme Court, and desegregation cases across the country are largely being decided in favor of "local control," aka segregation. And the results of these decisions has been seen everywhere, in many different ways, but the overall reality is that most students, white and of color, attend schools where racial and ethnic segregation are the norm.

One must only look at the statistics to clearly see that while some progress had been made in efforts to desegregate, the combination of the Court's decisions has now effectively segregated America's children. For example, the urban school districts in New York, Los Angeles, Houston, Philadelphia, and Chicago are all over 75% minority;[59] and on average, White students attend schools where they make up 80% of the student population and Black and Latino students makeup a combined 16% of the student body, while most Black and Latino students attend schools that are almost 75% minority.[60]

In 2000, the average Black and Latino student attended a school where 44% of all students lived at or below the poverty line, while the average White student attended a school with 19% poor students.[61] A recent assessment of 4th graders found that 73% of White students can read at or above the basic level, compared to only 40% of Latino students and 36% of Black students.[62] And in 1988, in the average SAT score for Whites was 1036, 189 points higher than the average score of 847 for Blacks. By 2002, the average score for Blacks had risen all the way to 857, while the White average was 1060.[63]

The reversal of *Brown* has essentially created a situation where most Black, Latino, and Native American students do not have the same equality of educational opportunity as White students. As a 2003 study by the *Journal of Blacks in Higher Education* explains, "Public schools in many neighborhoods with large black populations are under funded, inadequately staffed, and ill equipped to provide the same quality of secondary education as is the case in predominantly white suburban school districts."[64] It is no

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[58] Orfield, *Dismantling Desegregation*, 4.
[59] Frankenburg, Lee, and Orfield, 54.
[60] Frankenburg, Lee, and Orfield, 27.
[61] Frankenburg, Lee, and Orfield, 35.
[62] Paige, Roderick. "The Back Page: No Child Left Behind," retrieved on July 24, 2003 from <http://www.carnegie.org/reporter/02/backpage/index_low.html>.
[63] "The Expanding Racial Scoring Gap Between Black and White Test Takers," *The Journal of Blacks in Higher Education*. Retrieved on July 30, 2003 from <http://www.jbhe.com/latest/37_b&w_sat.html>.
[64] "The Expanding . . ." *The Journal of Blacks in Higher Education*.

wonder why, under these types of conditions that on average dropout rates are much higher for minority students than for whites.

Once again, Justice Ginsburg seems to be the only member of the Court concerned with the current state of public schools, as she mentions the problem of unequal public education in her concurring opinion in *Grutter*, arguing that "however strong the public's desire for improved education systems may be, it remains current reality that many minority students encounter markedly inadequate and unequal educational opportunities."[65] And until K-12 education is improved, and minority students actually have an equal chance for admittance to elite institutions such as the University of Michigan Law School, affirmative action policies will be necessary, but more importantly they will be devoid of any powerful meaning. As CUNY professor Stanley Aronowitz eloquently explains, until we equalize educational equity, "the relative deprivation of resources and equipment. . . the erosion of well-appointed and safe school buildings in urban elementary and secondary schools. . . the lack of enriched cultural programs" forces inequality on poor, minority students.[66] "Unless national policy works to reverse failures at these levels," according to Aronowitz, "the demand to raise standards is tantamount to a policy of wholesale class and racial exclusions."[67]

Conclusion

The decisions handed down by the Supreme Court in the cases against the University of Michigan certainly are important, but the Court's ruling in favor of affirmative action policies in college admissions will not have a very big impact on minority students. Only about 150 out of 1,800 institutions of higher education are competitive enough to warrant the use of affirmative action admissions policies, and 74% of the student populations at these institutions come from families with incomes in the top 25%.[68] When you consider that 50% of Black children and 44% of Latino children under the age of 6 live in poverty,[69] it appears clear that the gap between poor minority students and their middle class white counterparts will not be lessened by these decisions.

Understood in this context, the Michigan decisions are little more than window dressing on the issue of racial justice and equality, covering up enough of the real problems concerning institutional racism so that we do not have to publicly address them. What we need instead, according to writer Salim Muwakkil, is "A more honest reckoning of our history" that "would reveal the difficulty of transcending racial disadvantage without some attempt to repair the damage done to a people victimized by 16 generations of racial slavery and Jim Crow apartheid."[70]

In general, we need to realize that bickering about affirmative action enables us to look past the deeper problems of institutional racism that we must address in order to

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[65] *Gratz,* 539 U.S. 02-516 (2003).
[66] Aronowitz, Stanley. *The Knowledge Factory: Dismantling the Corporate University and Creating True Higher Learning*. Boston: Beacon Press, 2000. 104.
[67] Aronowitz, 104-105.
[68] Hentoff, Nat. "Sandra Day O'Connor's Elitest Decision." *The Village Voice* 18 July 2003. <http://www. villagevoice.com/issues/0330/hentoff.php>.
[69] Moses, Michele. *Embracing Race: Why We Need race-Conscious Education Policy*. New York: Teachers College Press, Columbia University, 2002. 131.
[70] Muwakkil, Salim. "Affirmative Denial." *In These Times* 15 July 2003. <http://inthesetimes.com/comments.php?id=280_0_3_0_M>.

"find real and lasting solutions to racial disparities in educational opportunity."[71] We need to have an honest public debate in order to realize that, as Princeton professor and celebrated public intellectual Cornel West contends, "Race is not a moral mistake of individuals . . . It is a feature of institutions and structures that insures that one group of people have less access to resources, both material and intangible."[72] Until we look past our personal differences and realize that racial discrimination is most powerful within the institutions that dictate access and opportunity, the Michigan decisions, and others like it, won't mean much of anything to those it alleges to empower.

[71] Crenshaw, Kimberle Williams. "Beyond Affirmative Action: The Twenty-Five Year Détente." *TomPaine.com* 10 July 2003. Retrieved on July 17, 2003 from <http://www.aapf.org/pages/detente.html>.
[72] West, Cornel. *Beyond Eurocentrism and Multiculturalsim*. Common Courage Press, 1993. 11.