EDUCATION

(RE)CONSIDERING RACE IN THE DESEGREGATION OF HIGHER EDUCATION

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> Because the courts have spoken so often on the constitutional status of racial preferences, there has been a tendency to frame the discussion in terms of individuals' rights and to emphasize procedural matters. This, I submit, is regrettable because achieving substantive racial justice is actually the more fundamental moral concern.[1]
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> [T]he habit of ignoring race is understood to be a graceful, even generous, liberal gesture. To notice is to recognize an already discredited difference. To enforce its invisibility through silence is to allow the black body a shadowless participation in the dominant cultural body.[2]

I. INTRODUCTION: THE GOLDEN ANNIVERSARY OF DESEGREGATION AT THE UNIVERSITY OF GEORGIA

In this Fiftieth Anniversary of the desegregation of the University of Georgia (UGA), we celebrate the contributions of the foot soldiers who led the battle to desegregate the university and helped advance democracy for persons of African descent. We also recognize, at this historical moment, that while the desegregation of UGA half a century ago centered on the admission of black students barred from the university by state-sanctioned racist policies,[3] this civil rights milestone has led to a more inclusive university for individuals from very diverse backgrounds and cultures.

It is fitting that in this fiftieth year since UGA admitted its first two African-American students, the university has admitted the

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[1] Glenn C. Loury, *Foreword* to WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER, at xxiii (2d prtg. 2000).

[2] TONI MORRISON, PLAYING IN THE DARK 9–10 (Vintage Books 1993) (1992).

[3] *See* Holmes v. Danner, 191 F. Supp. 394, 396 (M.D. Ga. 1961) (holding that no public university in Georgia may deny admission to an applicant "solely because of his race or color").

most diverse student body in its history. A record 480 African-Americans were admitted to the freshman class of 2011, comprising 8.9% of the entering class.[4] The previous record was set in 1995, when 440 African-American freshmen were accepted to the university.[5] Yet given that African-Americans comprise more than 30% of the college-age population in Georgia,[6] and despite the progress UGA has made since 1961, much work still needs to be done to ensure greater equality.

It is also fitting that in this fiftieth year of UGA's desegregation, the university hired the inaugural endowed professor named for Mary Frances Early, the first African-American graduate of UGA.[7] Moreover, the Board of Regents approved the Donald L. Hollowell Distinguished Professorship of Social Justice and Civil Rights Studies,[8] the first distinguished professorship named for an African-American in the history of the university.[9] Hollowell was chief counsel for plaintiffs Hamilton Holmes and Charlayne Hunter in the landmark *Holmes v. Danner*[10] case that led to the desegregation of UGA in 1961.[11] The creation of these positions represents an impressive step forward.

The Fiftieth Anniversary provides an opportunity to reflect on how far we have come, articulate future goals, and determine how

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[4] *Record Number of Black Freshmen at the University of Georgia*, J. BLACKS IN HIGHER EDUC. (Aug. 25, 2011), http://www.jbhe.com/2011/08/record-number-of-black-freshmen-at-the-university-of-georgia/.

[5] *Id.*

[6] *Id.*

[7] The story of Mary Frances Early's struggle at UGA was featured in *Foot Soldier for Equal Justice: Part I: Horace T. Ward and the Desegregation of the University of Georgia* (Georgia Public Television broadcast Feb. 28, 2000) [hereinafter *Foot Soldier for Equal Justice*].

[8] Minutes of the Meeting of the Board of Regents of the University System of Georgia (Aug. 10–11, 2010), http://www.usg.edu/regents/documents/board_meetings/minutes_08_2010.pdf. For sources on Donald L. Hollowell's civil rights work, see generally LOUISE HOLLOWELL & MARTIN C. LEHFELDT, THE SACRED CALL: A TRIBUTE TO DONALD HOLLOWELL—CIVIL RIGHTS CHAMPION (1997); *Donald L. Hollowell: Foot Soldier for Equal Justice* (Georgia Public Television broadcast 2010).

[9] Press Release, Wendy Fowler Jones, Univ. of Ga., UGA Announces the Endowment of the Donald L. Hollowell Professorship (Apr. 16, 2010), http://news.uga.edu/releases/article/donald-l.-hollowell-professorship/.

[10] 191 F. Supp. 394 (M.D. Ga. 1961).

[11] *See id.* at 396.

best to overcome contemporary challenges to achieving greater diversity and inclusiveness throughout the university. It is commendable that the UGA School of Law commemorated the anniversary by sponsoring this Symposium entitled "Civil Rights or Civil Wants" and by hosting a reenactment of the *Holmes* trial.[12] Though UGA and other institutions of higher education have miles to go before equity and parity become a reality, these are important steps in the continuous struggle for equal opportunity.

This Essay provides a brief history of the struggle to desegregate the University of Georgia, contextualizing this struggle within the broader history of the desegregation of higher education. Drawing upon Derrick A. Bell's theory of interest-convergence,[13] it examines recent court decisions that have altered the social and political landscape of public discourse with respect to the consideration of race in education, the value of diversity, and the way we address racial inequality in a presumptively "post-racial" society. Specifically, this Essay interrogates the shift in jurisprudence on questions of race from an emphasis on remedying racial discrimination and inequality to a focus on diversity, particularly with respect to the legal justification or disavowal of racial consideration under affirmative action programs and the constitutionality of raced-based desegregation.

Importantly, the invalidation of racial consideration in a number of recent federal cases suggests that racial equality no longer represents a compelling public interest, moral, legal, or civic rationale for desegregation.[14] Instead, "colorblind" social

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[12] *A Re-enactment of the Holmes–Hunter Trial and Legal Panel*, UNIV. OF GA. SCHOOL OF LAW (Feb. 25, 2011), http://digitalcommons.law.uga.edu/lectures_pre_arch_lectures_other/46/.

[13] *See generally* Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518 (1980).

[14] *See* Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 747–48 (2007) (holding that Seattle could not assign students to schools on a racial basis); Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). *Hopwood* was the first successful legal challenge to a university's affirmative action policy in student admissions since *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 320 (1978) (holding the special admissions program invalid). However, the Supreme Court abrogated the *Hopwood* decision in 2003. *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (holding that "the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body").

policies and appeals to diversity have increasingly usurped racial equality and justice as civic imperatives in twenty-first century American society.[15] In principle, the desire to establish racial neutrality is a commendable ideal. However, in the face of unprecedented levels of social inequality, ahistorical colorblind policies amount to socially irresponsible delusions that place theory and procedural questions over more pragmatic human concerns.[16]

As a backdrop to the historic struggle against state-sponsored Jim Crow laws, this Essay also examines the intricacies of the NAACP's legal strategy to defeat segregation and discusses how public higher education became a focal point in the battle for civil rights. The story of Horace T. Ward's struggle to enroll in the UGA School of Law sheds light on the arc of the university's desegregation history[17] and illuminates how *Ward v. Regents of the University System of Georgia*[18]—the first lawsuit that sought to dismantle segregation at the university—set a precedent for legal strategy in the *Holmes* case. Finally, this Essay attempts to elucidate significant questions that will assist universities in addressing current disparities in the admission and retention of underrepresented students.[19]

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[15] *See* Reva B. Siegel, *The Racial Rhetorics of Colorblind Constitutionalism: The Case of* Hopwood v. Texas, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION 29, 30 (Robert Post & Michael Rogin eds., 1998) (arguing that "the rhetoric of colorblind constitutionalism" can be invoked to protect racial stratification).

[16] *See* IRA KATNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 142–62 (2005); *see also* W.E.B. DU BOIS, AUTOBIOGRAPHY OF W.E.B. DUBOIS: A SOLILOQUY ON VIEWING MY LIFE FROM THE LAST DECADE OF ITS FIRST CENTURY 303–07 (1968). For a comparative and in-depth analysis of how increased social equality enhances the health of societies, see generally RICHARD WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER (2009).

[17] For a history of the desegregation of the UGA and Horace T. Ward's quest to enter the School of Law, see generally MAURICE C. DANIELS, HORACE T. WARD: DESEGREGATION OF THE UNIVERSITY OF GEORGIA, CIVIL RIGHTS ADVOCACY, AND JURISPRUDENCE (Howard Univ. Press, reprt. 2004). *See also Foot Soldier for Equal Justice*, *supra* note 7; ROBERT A. PRATT, WE SHALL NOT BE MOVED: THE DESEGREGATION OF THE UNIVERSITY OF GEORGIA (2002).

[18] 191 F. Supp. 491 (N.D. Ga. 1957).

[19] According to a guidance on the voluntary use of race to further the compelling interest of achieving diversity in postsecondary education published by the Civil Rights divisions of the Departments of Justice and Education in December 2011.

II. AFFIRMING DIVERSITY AT THE EXPENSE OF THE PRINCIPLE OF RACIAL EQUALITY

As Professor Derrick Bell argues in his theory of interest-convergence, "[b]lack rights are recognized and protected when and only so long as policymakers perceive that such advances will further interests that are their primary concern."[20] This principle speaks to the heart of what the social construction of race in America has always been about: the competing interests and intersecting economies of wealth, education, and power. Bell asserts that white institutions have not historically advanced the interests of African-Americans through integration or inclusion without accruing equal or greater benefit to themselves or their interests in the process.[21]

Bell's argument is supported by the social history of race in the United States and the contemporary assault on affirmative action in favor of race-neutral admissions policies that, regardless of their intent, have a race-specific impact on underrepresented

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> the benefits of participating in diverse learning environments flow to an individual, his or her classmates, and the community as a whole. These benefits greatly contribute to the educational, economic, and civic life of this nation. . . . Interacting with students who have different perspectives and life experiences can raise the level of academic and social discourse both inside and outside the classroom; indeed, such interaction is an education in itself. By choosing to create this kind of rich academic environment, educational institutions help students sharpen their critical thinking and analytical skills.

CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION 1 (Dec. 2, 2011). Therefore, while the authors of this Essay maintain that addressing past discrimination, ensuring racial equality, and promoting social justice are more substantive reasons to implement affirmative action programs, we recognize the educational value of diversity and affirm its importance to the intellectual and social development of elementary, secondary, and postsecondary students. Similarly, diversity among staff, faculty, and administrators in higher education is equally important and should not be limited to the consideration of race. Ultimately, ensuring a critical mass of students from diverse backgrounds should be part of the institutional mission of all public and private universities.

[20] DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 49 (2004).

[21] *See id.* at 49–58 (pointing to three historical examples of interest-convergence to support Bell's claim).

populations. Declining African-American admission rates at major public research institutions within the University of California system, for example, suggest that not considering race has a disproportionate and pejorative effect on African-American and Latino matriculation rates.[22] Racial neutrality and the emphasis on diversity in contemporary discourse on race in higher education represent two aspects of an ahistorical strategy to evade the realities of race and class inequality in American society.

While increasing diversity enriches the academic environment and enhances the curricular aims of education, the legal and rhetorical emphasis on diversity sidesteps the more challenging social issues of race and class inequality. As a rationale for the Supreme Court's decision in *Grutter v. Bollinger*[23]—a case involving the University of Michigan Law School—recourse to diversity allowed the majority to tacitly acknowledge racial inequality without explicitly addressing race.[24] Instead, the

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[22] According to a report published by the Tomas Rivera Policy Institute at the University of Southern California,

> the percentage of Latino applicants accepted at [University of California (UC)] campuses dropped from 68% in 1995 to 45% in 2003. For African American students, the rate fell from 58% in 1995 to 35% in 2003. The declines were most precipitous at UC's most competitive campuses, Berkeley and Los Angeles . . . .

Rebecca Trounson, *Declining Minority Admissions Rate at UC Is Criticized*, L.A. TIMES, Oct. 27, 2004, at B5. Additionally, more recent data published by the UC Office of the President indicates that from Fall 2009 to 2011, the number of African-American residents admitted to UC Berkeley decreased from 365 in 2009 to 348 in 2010 to only 332 in 2011. UNIV. OF CAL. OFFICE OF THE PRESIDENT, TABLE 3: PERCENT CHANGE IN CALIFORNIA RESIDENT FRESHMAN ADMIT COUNTS BY CAMPUS AND RACE/ETHNICITY 4 (2011), *available at* http://www.ucop.edu/news/factsheets/2011/fall_2011_admissions_table_3.pdf.

[23] 539 U.S. 306 (2003).

[24] *See id.* at 328 (holding that attaining a diverse student body is a compelling government interest). According to the interpretation of *Grutter* and *Gratz v. Bollinger*, 539 U.S. 244 (2003), published by the Civil Rights divisions of the U.S. Departments of Justice and Education, both cases held that diversity constituted a compelling interest for institutions of higher education. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY AND AVOID RACIAL ISOLATION IN ELEMENTARY AND SECONDARY SCHOOLS 2 n.9 (Dec. 2, 2011). However, whereas the *Grutter* decision affirmed the consideration of individual students' race as a factor in the holistic review of applicants to the University of Michigan Law School, the *Gratz* decision held that the undergraduate university's race-conscious plan was not tailored narrowly enough to achieve the interest of diversity. *Id.*

"narrowly tailored" consideration of race was deemed permissible to the extent that it served the compelling institutional interests of the university, which sought to ensure the educational benefits inherent in having a diverse student body.[25] This decision, along with the ruling in *Gratz v. Bollinger*—a case involving undergraduate admissions at the University of Michigan in which racial consideration was held to be in violation of the Fourteenth Amendment[26]—set a legal precedent for subsequent cases like *Parents Involved in Community Schools v. Seattle School District No. 1*.[27] In *Parents Involved*, the Supreme Court ruled that racial balancing could not be invoked as a compelling justification for the integration of schools, despite the public school districts' stated investment in preventing racial isolation and fostering racial diversity.[28]

As these holdings reveal, it took just four years for the diversity defense of racial consideration to be nullified at the primary and secondary level. By narrowly delimiting its use as a last resort within the context of diversity, these decisions have effectively invalidated the consideration of race despite the fact that race continues to matter in determining access to opportunity, quality education, and socioeconomic resources.[29] As Professor Eric Foner

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[25] *See Grutter*, 539 U.S. at 333–34 (discussing the narrow tailoring requirement in relation to race-conscious admission programs).

[26] *Gratz*, 539 U.S. at 275.

[27] 551 U.S. 701 (2007).

[28] *Id.* at 732. In *Parents Involved*, the Supreme Court specifically objected to the use of individualized racial classifications to achieve diversity or avoid racial isolation through the school districts' student assignment plans. *Id.* at 726. This race-conscious approach was deemed a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution because it was not "narrowly tailored" enough to achieve a compelling governmental interest—namely, diversity in education. *Id.* at 711, 726. To survive the standard of strict scrutiny, the Seattle and Louisville school districts would have had to (1) demonstrate consideration of workable race-neutral alternatives; (2) implement a procedure for the individualized review of students; (3) minimize the undue burden on other students; and (4) establish a defined term for the implementation of student assignment plans that is subject to periodic review. *Grutter*, 539 U.S. at 339–42. Importantly, the Court's decision noted that racial imbalance in schools is not, in and of itself, unconstitutional. *Parents Involved*, 551 U.S. at 721.

[29] According to Professor Douglas Massey, a sociologist at Princeton University who was quoted in a January 30, 2012, *New York Times* article about decreases in racial segregation, two trends characterize black–white segregation today:

argues, the judicial shift toward emphasizing diversity as a rationale for affirmative action in admissions policies fails to capture the root causes of racial disparities in education, wealth, healthcare, and a variety of other social indicators.[30] Moreover, the decision in *Regents of the University of California v. Bakke*[31] established that the value of race-conscious policies designed to correct for racial inequalities by addressing past discrimination will not be recognized as a compelling interest warranting racial consideration unless couched within the rhetorical frame of a narrowly tailored policy emphasizing diversity.[32] However, as a proxy for racial inequality, diversity is especially weak because it fundamentally ignores the original, corrective intent of affirmative

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> [I]n metro areas with small black populations, we indeed observed sharp decreases in segregation; but in those with large black populations, the declines are much slower and at times nonexistent. Although all-white neighborhoods have largely disappeared, this is more due to the entry of Latinos and Asians into formerly all-white neighborhoods.

Sam Roberts, *Study of Census Results Finds that Residential Segregation Is Down Sharply*, N.Y. TIMES, Jan. 31, 2012, at A13. *See also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 118–49 (1993). In their book Massey and Professor Nancy Denton describe how the residential segregation of black Americans in urban ghettos—a social and economic form of isolationism that has increased since the era of white flight and backlash following the civil rights movement—has created a disenfranchised underclass within American society. *Id.* at 61. The authors go on to describe that, despite the Fair Housing Act of 1968, segregation is perpetuated today through an interlocking set of individual actions, institutional practices, and governmental policies. *Id.* at 186–87.

[30] Eric Foner, *Diversity over Justice*, NATION, July 14, 2003, at 4. Foner was an expert witness in *Grutter*. *Id.* at 5.

[31] 438 U.S. 265 (1978).

[32] *See id.* at 311–15; *see also* Robert Post, *Introduction: After* Bakke, *in* RACE AND REPRESENTATION: AFFIRMATIVE ACTION, *supra* note 15, at 14–15. In addition to these references, the new guidance statements co-authored by the respective Civil Rights divisions of the Departments of Justice and Education under the Obama Administration maintain the importance of racial integration established in *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). *See supra* notes 19, 24. However, while the Departments recognize "the compelling interest in remedying the vestiges of past racial discrimination," their guidance does not address the remedial use of racial classification. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE & OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., GUIDANCE ON THE VOLUNTARY USE OF RACE TO ACHIEVE DIVERSITY IN POSTSECONDARY EDUCATION 1 (Dec. 2, 2011). The neglect of this issue is not benign. In fact, the silence on issues concerning racial inequality and justice engenders a discourse that is limited to diversity and that never addresses the root causes of social inequality in favor of dealing with symptomatic problems like imbalanced schools.

action. Reliance upon the diversity defense of affirmative action reveals the extent to which support for racial justice and equality in higher education is contingent upon instances of interest-convergence in which white-American access to social, economic, and educational resources is not perceived to be significantly threatened or diminished by minority inclusion. Even in instances where this convergence occurs, racial consideration must be narrowly tailored to have the least possible impact on those who have benefited the most from the history of racial caste in America.

In effect, the selective consideration of race in American society amounts to a kind of convenient colorblindness, which ensures that a statistically insignificant number of individuals from underrepresented groups are granted access to the American opportunity structure of higher education and the social rewards generally associated with educational advancement.[33] Conversely, the targeted consideration of race in the form of racial profiling and documented disparities in sentencing within the criminal justice system ensure that African-Americans are disproportionately overrepresented in correctional institutions.[34] Furthermore, by allowing a few fortunate members of various racial minority groups

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[33] For a critical analysis of the way in which colorblindness masks entrenched racial inequality, see LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 44–49 (2002). Rather than ignoring race, Guinier and Torres argue that race can and should be used as an indicator of the health of American democracy. Their concept of "political race" offers compelling equipoise to the premise of racial neutrality advanced by the rhetoric of "colorblind constitutionalism." *See id.* at 98–105; *see also* Siegel, *supra* note 15, at 31–32 (arguing that colorblindness protects the existing racial order).

[34] *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 175 (2010) ("More African Americans are under correctional control—in prison or jail, on probation or parole—than were enslaved in 1850, a decade before the Civil War began."). Furthermore, the U.S. Bureau of Justice Statistics estimates that as of 2008, there were more than 591,900 black men in prison, making up 38% of all inmates in the system. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PRISONERS IN 2008, at 1–2 (Dec. 2009). While African-Americans are roughly 13% of the U.S. population, they comprise about 40% of the prison population. And despite the fact that crime rates are now at a historical low, incarcerations rates among men of color have increased over the past thirty years. See TIM SULLIVAN ET AL., UNITED FOR A FAIR ECON., STATE OF THE DREAM 2012: THE EMERGING MAJORITY 18–20 (2012), *available at* http://faireconomy.org/sites/default/files/State_of_the_Dream_2012.pdf.

to successfully matriculate through institutions of higher learning, those individuals can be lauded as exceptional examples of hard work and used as evidence against the existence of institutional racism.

In his article entitled *Diversity's Distractions*, Bell argues that the focus on diversity avoids directly addressing the barriers of race and class in higher education.[35] He begins by asserting:

> For at least four reasons, the concept of diversity, far from a viable means of ensuring affirmative action in the admissions policies of colleges and graduate schools, is a serious distraction in the ongoing effort to achieve racial justice: 1) Diversity enables courts and policymakers to avoid addressing directly the barriers of race and class that adversely affect so many applicants; 2) Diversity invites further litigation by offering a distinction without a real difference between those uses of race approved in college admissions programs, and those in other far more important affirmative action policies that the Court has rejected; 3) Diversity serves to give undeserved legitimacy to the heavy reliance on grades and test scores that privilege well-to-do, mainly white applicants; and 4) The tremendous attention directed at diversity programs diverts concern and resources from the serious barriers of poverty that exclude far more students from entering college than are likely to gain admission under an affirmative action program.[36]

Focusing on the first two points of Bell's thesis, the rhetorical, legal, and political distraction of diversity represents a compromise between proponents and opponents of affirmative action that obfuscates the real questions surrounding racial representation in higher education: First, what constitutes merit?

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[35] Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1622–25 (2003).
[36] *Id.* at 1622.

Second, how should merit be evaluated?[37] And, finally, what compelling civic interests should govern decisions about who is granted access to the long-term socioeconomic benefits of higher education within the capitalist marketplace?[38] The dictates of meritocratic capitalism, despite being socially constructed in ways that are antithetical to pure democracy, hinge upon a hierarchical value system to both perpetuate and justify social inequality.[39] At the same time, racial disparities in America are exacerbated by a number of socioeconomic factors, including unequal access to economic and educational resources. In its original framing, affirmative action sought to address this problem. And while it did so imperfectly, the program made significant strides toward desegregation.[40]

The logic of decisions like the one reached in *Gratz* supports the assumption that considering race necessarily translates into a less or differently qualified minority applicant—as opposed to another white applicant—taking the admissions opportunity that might otherwise have gone, in that case, to Jennifer Gratz.[41] This decision exemplifies what Bell and Professor Charles W. Mills describe as the ideological investment in whiteness as a propertied right in which access to socioeconomic opportunities like higher

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[37] *See* William G. Bowen & Derek Bok, *The Meaning of "Merit," in* THE AFFIRMATIVE ACTION DEBATE 176, 176–82 (Stephen Cahn ed., 2002) (arguing that "[a]bove all, merit must be defined in light of what educational institutions are trying to accomplish"); *see also* STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH (2004).

[38] *See* DOUGLAS S. MASSEY, CATEGORICALLY UNEQUAL: THE AMERICAN STRATIFICATION SYSTEM 32–33, 191–210 (2007); *see also* JEAN COMAROFF & JOHN L. COMAROFF, MILLENNIAL CAPITALISM AND THE CULTURE OF NEOLIBERALISM 4, 7, 14–16, 88–90 (2001); DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 90–98 (2007).

[39] In his analysis of the link between capitalism and inequality, Massey contends that social inequality along the categorical lines of race, class, and gender is "produced by specific instructional mechanisms that are all variations on two basic strategies . . . discrimination and exclusion." MASSEY, *supra* note 38, at xv–xvi. Furthermore, Massey urges that "depending on how a market is structured and organized institutionally, it can produce more or less inequality and lead to greater or lesser stratification." *Id.* at xvi; *see also id.* at 23–27, 37–47, 53–55.

[40] *See* WILLIAM G. BOWEN & DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 3–10 (1998) (discussing origins of affirmative action).

[41] *See* Gratz v. Bollinger, 539 U.S. 244, 281 (2003) (Thomas, J., concurring); *id.* at 254 (majority opinion).

education inhere to white racial status.[42] Within this paradigm, when Gratz was denied admission to the University of Michigan, her property rights were violated, and the university was found by the Supreme Court to be in breach of an invisible racial contract.[43] Thus, Gratz's claim that she was entitled to admission could be verified by identifying an instance in which a less or differently qualified nonwhite applicant was admitted.[44] The implication of this thinking and the Supreme Court's jurisprudence in this case suggest that "[t]he current Court's concept of equal protection has essentially boiled down to supporting white plaintiffs who claim to be disadvantaged by affirmative action."[45]

Such cases add to the prevailing misrepresentation of affirmative action as a "reverse-racism" policy that gives "unqualified" students of color an unfair advantage over their white counterparts. However, far from being a policy of unwarranted racial preference, affirmative action was designed and intended to allow for the consideration of race as a form of redress for past forms of racial discrimination that have

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[42] *See* GEORGE LIPSITZ, THE POSSESSIVE INVESTMENT IN WHITENESS: HOW WHITE PEOPLE PROFIT FROM IDENTITY POLITICS 19–23 (1998); CHARLES W. MILLS, THE RACIAL CONTRACT 96–101 (1999); *see also* Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709 (1993). Lipsitz argues that the construction of white-racial privilege extends well beyond personal prejudice and relies on public policy to ensure the social status accorded to whiteness. LIPSITZ, *supra*, at vii. He defines whiteness as a structured advantage that produces unfair gains and unearned rewards for whites while imposing impediments to asset accumulation, employment, housing, education, and health care for minorities. *Id.* at viii. As a type of entitlement, European-Americans are encouraged to invest in whiteness in order to preserve the benefits of an identity that provides them with resources, power, and opportunity.

[43] *See* BELL, *supra* note 20, at 79; *see also* CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* 154 (2004).

[44] *Gratz*, 539 U.S. at 254. The basis of this argument was first established in *Bakke*, a Supreme Court case in which the Court decided the racial quotas or set-asides designated for members of a specific race automatically resulted in the exclusion of others based on race. 438 U.S. 265, 374–75 (1978). The decisions reached in both *Bakke* and *Gratz* suggest that racial consideration affecting the inclusion of African-Americans in higher education must be implemented in a manner that is not perceived to infringe upon, delimit, or come at the expense of white Americans' access to educational opportunities. *See also* Pero Dagbovie, *Historicizing Affirmative Action and the Landmark 2003 University of Michigan Cases*, *in* RACE AND HUMAN RIGHTS, at 199, 199–209 (Curtis Stokes ed., 2009).

[45] Eric Foner, *Partisanship Rules*, NATION, Jan. 1, 2001, at 6–7.

contributed to present racial inequalities.[46] This, rather than diversity, is the original justification for affirmative action, and for this reason—which has only become more relevant today—the attack on affirmative action has become a referendum on the existence of racism itself.[47] Thus, proponents of affirmative action now have to prove that racism exists, while so-called reverse-discrimination is evidenced by the mere recognition of race or the consideration of racial inequality. But "to take account of race while trying to mitigate the effects of [racism] cannot plausibly be seen as the moral equivalent of the discrimination that produced the subjugation of blacks in the first place."[48] Due to the difficulty of proving explicit and institutional racist intent, proponents of affirmative action have been compelled to argue their position by appealing to the redeeming social and educational value of diversity.[49] In his discussion of *Grutter*, Foner asserts,

> Michigan's lawyers decided to emphasize not persistent racial inequality but the educational value of racial diversity. The diversity argument presents affirmative action not as a program that primarily aids minorities but as one that improves the educational environment, a more politically palatable case. But it runs the risk of suggesting that access for nonwhite students is desirable mainly because it enhances the educational experience of whites by exposing them to classmates from different backgrounds. Diversity is undoubtedly a worthy goal. But a single-minded focus

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[46] *See* SULLIVAN ET AL., *supra* note 34, at iv–ix; *see also* ROY H. KAPLAN, THE MYTH OF POST-RACIAL AMERICA: SEARCHING FOR EQUALITY IN THE AGE OF MATERIALISM (2010); TIM WISE, COLORBLIND: THE RISE OF POST-RACIAL POLITICS AND THE RETREAT FROM RACIAL EQUITY (2010).

[47] *See* LESLIE G. CARR, "COLORBLIND" RACISM 107–14, 129–32 (1997).

[48] Loury, *supra* note 1, at xxv–xxvi.

[49] *See* Grutter v. Bollinger, 539 U.S. 306, 333 (2003) ("The Law School has determined, based on its experience and expertise, that a 'critical mass' of underrepresented minorities is necessary to further its compelling interest in securing the educational benefits of a diverse student body.").

> on diversity deflects attention from the need to combat numerous inequalities . . . .[50]

The selective (in)validation of the use of race in university admissions processes and in American society more broadly speaks to Bell's second point, which highlights the inconsistency with which race is applied and supports his theory of interest-convergence.[51] Examining the terms and conditions under which race is considered reveals that even in the age of de jure, colorblind social policy, the idea of race is deployed strategically. Given Bell's critique of diversity as an argument for desegregation, we must seek to craft admissions policies that pragmatically and progressively confront the inextricably linked issues of race and class. Without such policies, racial disparities in education—whether or not they result from intended or explicit racial bias—will continue to plague institutions of higher learning.[52]

The erosion of affirmative action programs reveals that over the past twenty years the courts have adopted a strategy of racial disavowal that passively attempts to address racial disparities created by centuries of active racial discrimination.[53] This problem is exacerbated by lingering forms of institutional racism and increasing levels of social inequality that make it challenging for a wide array of Americans from different racial backgrounds to afford college.[54] Without an active initiative that considers race in relationship to class, the underrepresentation of African-Americans

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[50] Foner, *supra* note 30, at 4.

[51] *See* Bell, *supra* note 35, at 1622–24 ("Read together, *Grutter* and *Gratz* provide a definitive example of my Interest-Convergence theory.").

[52] *See* WILLIAM JULIUS WILSON, THE BRIDGE OVER THE RACIAL DIVIDE: RISING INEQUALITY AND COALITION POLITICS 11–20 (1999) (discussing institutional cultural racism in U.S. education systems).

[53] *See* KATZNELSON, *supra* note 16, at 142–61 (arguing for the necessity of affirmative action today and contending that policy makers and the judiciary previously failed to consider just how unfairly blacks had been treated by the federal government in the thirty years before the civil rights revolution of the 1960s).

[54] *See generally* John Karl Scholz & Kara Levine, *U.S. Black-White Wealth Inequality*, *in* SOCIAL INEQUALITY 895 (Kathryn M. Neckerman ed., 2004) (noting the impact of wealth inequality on educational attainment).

and other minorities in higher education could result in the de facto resegregation of public education in America.

Affirmative action needs reform, but to ignore race in college admissions altogether or treat diversity as a panacea for inequality is to invest in the illusion of a colorblind society. As James Baldwin wrote, "[p]eople who cling to their delusions find it difficult, if not impossible, to learn anything worth learning."[55] Therefore, rather than ignoring race under a de jure policy that refuses to recognize the social efficacy of race in America, institutions of higher education entrusted with our collective public interests should develop holistic admissions policies that take a variety of academic, extracurricular, social, and personal criteria into consideration. As socially significant variables in an environment that is increasingly characterized by economic inequality and racial segregation, race and class are too important to disregard.[56]

III. TEACHABLE MOMENTS AND HISTORICAL LESSONS

Within the history of desegregation in higher education, the most vivid images of the Civil Rights Movement come from the 1960s, a period in which racial confrontations took place on college campuses in the Deep South.[57] Images from 1962 show Governor

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[55] JAMES BALDWIN, NO NAME IN THE STREET 129 (1972).

[56] In a national study, researchers at The Civil Rights Project of Harvard University found that after greatly increasing desegregation of public schools a generation ago, the United States public education system is now steadily consolidating a trend toward racial resegregation that began in the late 1980s. *See* GARY ORFIELD & JOHN T. YUN, HARV. UNIV., CIVIL RIGHTS PROJECT, RESEGREGATION IN AMERICAN SCHOOLS 12 (1999) (using data from the National Center of Educational Statistics). Interestingly, this trend is occurring as the nation becomes increasingly racially and ethnically diverse. *Id.* at 7. Among its key findings, the study showed that segregation by race is very strongly related to segregation by class and income. *Id.* at 3, 16–17. Racially segregated schools—for all groups except whites—are almost always schools with high concentrations of poverty. *Id.* at 16–17. Almost nine-tenths of intensely segregated African-American and Latino schools experience concentrated poverty. *Id.*

[57] *See generally* E. CULPEPPER CLARK, THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA (1993) (chronicling desegregation at the University of Alabama); DANIELS, *supra* note 17 (chronicling desegregation at UGA); CHARLES W. EAGLES, THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS (2009) (recounting the story of the first black student at the University of Mississippi); JACK

Ross Barnett standing in the doorway of the Registrar's Office to block James Meredith from entering the University of Mississippi.[58] Similarly, photographs of Governor George Wallace standing in the doorway of Foster Auditorium to block James Hood and Vivian Malone from entering the University of Alabama reveal the vehemence with which racial segregation was defended throughout the South.[59] However, it should be underscored that in addition to the civil rights struggles undertaken in the Deep South, the battle to desegregate colleges and universities covered a broad spectrum of states that included campuses across the country.[60]

While the battle for civil rights was fought on many fronts, including anti-lynching and voting rights campaigns,[61] in the mid-1930s the NAACP conceived a legal strategy to dismantle segregation in education.[62] Civil rights officials chose graduate and professional schools as their initial battleground, believing these schools provided the best chance for legal success. While segregationists often argued in court that dilapidated, underfunded black schools were equal to white institutions, they could not make this argument for graduate and professional schools because such opportunities for blacks were virtually nonexistent.[63] Moreover, the cost of creating separate law,

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GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994) (examining legal battles involving school integration and other civil rights issues); CONSTANCE BAKER MOTLEY, EQUAL JUSTICE UNDER LAW (1998) (autobiography focusing on representation of a black student attempting to enroll at the University of Mississippi); PRATT, *supra* note 17 (chronicling desegregation at UGA); *Hamilton Earl Holmes: The Legacy Continues* (Georgia Public Television broadcast Jan. 25, 2004) (examining the life and family of the first African-American man admitted to UGA).

[58] *See* EAGLES, *supra* note 57, at 303–04 (describing the standoff).

[59] CLARK, *supra* note 57, at 144.

[60] *See* GREENBERG, *supra* note 57; MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950 (1987) (discussing the NAACP's nationwide desegregation campaign).

[61] *See* WALTER WHITE, A MAN CALLED WHITE: THE AUTOBIOGRAPHY OF WALTER WHITE 120–24 (1948).

[62] *See* GREENBERG, *supra* note 57, at 5–6; TUSHNET, *supra* note 60; WHITE, *supra* note 61, at 142–43; Interview with Constance Baker Motley, in N.Y.C., N.Y. (Mar. 30, 1995).

[63] Sally Seawright, *Desegregation at Maryland: The NAACP and the Murray Case in the 1930's*, 1 MARYLAND HISTORIAN 59, 59 (1970).

medical, and graduate schools of equal caliber to all-white schools was prohibitive.[64]

A visionary foot soldier in this struggle was NAACP legal counsel Charles Hamilton Houston, a Harvard Law graduate and the first black student elected editor of the *Harvard Law Review*.[65] Houston later became the Dean of Howard University School of Law, where he mentored students such as future civil rights barrister Thurgood Marshall.[66] Houston believed that beginning with professional schools, which were comprised mostly of men, would meet with less resistance among those who subscribed to the racist belief that segregation should be sustained to keep black men and white women apart.[67] In 1936, Houston enlisted Marshall's help in dislodging segregation.[68] In their first case, *Pearson v. Murray*,[69] they won a landmark court decision against the University of Maryland School of Law to eliminate the practice that prohibited Negroes from entering its doors.[70]

Two years later the NAACP launched a legal attack on the state of Missouri.[71] When Missouri resident Lloyd Gaines sought to enter the University of Missouri School of Law, the university refused his admission based on race but offered him a waiver to attend law school outside the state.[72] This was a common practice that allowed states to maintain their schools' all-white status and avoid the cost of establishing black professional schools.[73] Gaines refused to accept the waiver and instead filed a lawsuit. The U.S. Supreme

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[64] *See id.* ("[I]t would be financially impossible for states to give separate yet equal facilities for Negroes in higher education."); *see also* GARY M. LAVERGNE, BEFORE *BROWN*: HEMAN MARION SWEATT, THURGOOD MARSHALL, AND THE LONG ROAD TO JUSTICE 86 (2010) (estimating cost of creating a school equal to University of Texas at $25 million in 1945).

[65] For a study of Charles Hamilton Houston and his battle for social justice, see generally GENNA RAE MCNEIL, GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS (1983).

[66] GREENBERG, *supra* note 57, at 5.

[67] *Id.* at 5–6.

[68] *Id.* at 6.

[69] 182 A. 590 (Md. 1936).

[70] *Id.* at 590, 592, 594.

[71] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

[72] A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 164–65 (1996).

[73] *Id.*

Court agreed with the NAACP's argument that a state could not free itself of its Fourteenth Amendment obligation by sending its African-American students out of state.[74] Unfortunately, Gaines was never able to take advantage of his victory. After winning the lawsuit, Gaines disappeared and his disappearance remains a mystery today.[75]

On January 14, 1946, Ada Lois Sipuel applied to the University of Oklahoma School of Law.[76] Despite the U.S. Supreme Court decision in *Gaines*, Oklahoma officials denied her admission because of her race.[77] In a January 14, 1946, letter to Sipuel, University of Oklahoma President George Cross wrote, "Title seventy . . . of the Oklahoma Statutes, 1941, prohibits colored students from attending the schools of Oklahoma, including the University of Oklahoma, and makes it a misdemeanor for school officials to admit colored students to white schools."[78] Two years later, Sipuel won a unanimous Court decision declaring that Oklahoma was constitutionally obligated to provide her with an equal education.[79] Oklahoma officials later admitted Sipuel but roped off a small space in the state capitol building to serve as her law school.[80]

Equally troubling was the case of G.W. McLaurin, who sought to enter the Graduate School of Education at the University of Oklahoma.[81] Oklahoma officials eventually admitted McLaurin but restricted him "to sit in an alcove in the back of the classroom and at a separate table in the library and cafeteria."[82] With the help of Thurgood Marshall, McLaurin filed a lawsuit against Oklahoma officials.[83] At about the same time as the McLaurin

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[74] *Gaines*, 305 U.S. at 350.

[75] ROBERT H. BRISBANE, THE BLACK VANGUARD: ORIGINS OF THE NEGRO SOCIAL REVOLUTION 1900–1960, at 191 (1970); WHITE, *supra* note 61, at 162.

[76] ADA LOIS SIPUEL FISHER, A MATTER OF BLACK AND WHITE: THE AUTOBIOGRAPHY OF ADA LOIS SIPUEL FISHER 81 (1996).

[77] *Id.* at 84–85.

[78] *Id.*

[79] Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 631–33 (1948).

[80] GREENBERG, *supra* note 57, at 65.

[81] MOTLEY, *supra* note 57, at 64.

[82] *Id.* at 65.

[83] *See id.* (noting that McLaurin's case was appealed to the Supreme Court).

case, Heman Marion Sweatt sought to enter the University of Texas School of Law.[84] Taking a cue from Oklahoma officials, Texas officials set up a law school for blacks in the basement of a building in Austin.[85] Sweatt refused to enter the inferior facility and sought the help of skillful NAACP lawyers, who subsequently won two major victories in 1950 representing McLaurin and Sweat.[86] In *McLaurin v. Oklahoma*, the Supreme Court ruled that the University of Oklahoma could not segregate black students after they were admitted.[87] On the same day, in *Sweatt v. Painter*, the Court unanimously declared that the makeshift "law school" set up in the basement of a building was in no way equal to the University of Texas Law School.[88]

These decisions represent only a few of the legal cases fought to desegregate higher education, which set the stage for Horace Ward—a graduate of Morehouse College and Atlanta University—to begin the struggle to enter UGA's law school in 1950.[89] In 1950, on the heels of the *Sweatt* and *McLaurin* victories, a hopeful Ward submitted his application to the UGA School of Law.[90] Ward had studied the *Sweatt* and *McLaurin* decisions in a political science course at Atlanta University.[91] In an interview with Ward, he recalled thinking that in light of these cases, UGA would have to admit him without a court fight.[92]

Yet Ward had not taken into account the extent of the racially polarized political landscape, nor the formidable opponent he faced in Governor Herman Eugene Talmadge.[93] Talmadge's mantra was, "As long as I am your Governor, Negroes will not be admitted

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[84] LAVERGNE, *supra* note 64, at 6.

[85] WHITE, *supra* note 61, at 149; Motley, *supra* note 62.

[86] Sweatt v. Painter, 339 U.S. 629, 635 (1950); McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637, 642 (1950).

[87] *McLaurin*, 339 U.S. at 642.

[88] *Sweatt*, 339 U.S. at 632–36.

[89] DANIELS, *supra* note 17, at 31.

[90] Interview with Horace T. Ward, in Atlanta, Ga. (June 29, 1994).

[91] *Id.*

[92] *Id.*

[93] *Id.*

to white schools."[94] Talmadge was unmoved by the Court victories in Missouri, Oklahoma, and Texas, and instead asserted that segregation was a way of life in the South and politicians had to subscribe to this culture to sustain their political life:

> We had had several hundred years of segregation. It was the mores and custom. Not only with people, but it was written in the constitution, and laws. Any political figure that dared to defy that wouldn't have carried a county in the state. Any Southern leader who would have had different views from mine would have been run out of office.[95]

Talmadge galvanized opponents of desegregation and even sponsored legislation to block Ward from entering UGA.[96]

Undeterred by Talmadge or the General Assembly, Ward appealed his rejection.[97] Despite the Supreme Court's ruling in *Gaines* that offering African-American students an out-of-state tuition waiver was unconstitutional, the Georgia Regents offered Ward a tuition waiver to attend law school out of state, which he refused.[98] During Ward's lengthy appeals process, state leaders, Regents, and the law school faculty conspired to keep him out of the university.[99] On June 11, 1952, the Regents adopted new

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[94] Henderson, Sweatt, McLaurin *Rulings Hailed by Leaders*, ATLANTA DAILY WORLD, June 6, 1950, at 1.

[95] Interview with Herman Talmadge, in Hampton, Ga. (Jan. 23, 1995).

[96] *See* General Appropriations Act, 1951 Ga. Laws 425 (denying funds to schools that desegregated). Similar provisions appear in the General Appropriations Act, 1953 Ga. Laws 155, and General Appropriations Act, 1956 Ga. Laws 762.

[97] *See* Letter from J. Alton Hosch, Chairman of the Univ. of Ga. Faculty Comm., to Dr. O.C. Aderhold, President of the Univ. of Ga. (Sept. 13, 1951) (on file with the Univ. of Ga. Libraries).

[98] *Out-of-State University Aid Declined by Negro*, ATLANTA J., Oct. 18, 1950; Chuck Martin, *Out-of-State Tuition Offer Refused by Negro Law School Applicant: Regents Promise Legal Fight as Admission Threat Looms*, RED & BLACK, Oct. 20, 1950, at 1; Minutes of the Meeting of the Bd. of Regents of the Univ. Sys. of Ga. 20 (July 12, 1950) (on file with Archives, Univ. Sys. of Ga. Bd. of Regents Office, Atlanta, Ga.).

[99] John Britton, *Regents Chief Admits Segregation Attempts*, ATLANTA DAILY WORLD, Dec. 12, 1958, at 1; John Pennington, *Regents Bar Further Action on Ward Case 'at this Time,'* ATLANTA J., Jan. 14, 1953, at 1; Charles Pou, *Cook Gets Legal Aid in Fight To Keep Schools Segregated*, ATLANTA J., July 8, 1955, at 1; *see also* Minutes of the Meeting of the

recommendations from the university's president requiring applicants to secure two certificates of good moral character from law school alumni.[100] It is worth noting, however, that one professor, Professor James Lenoir, opposed the actions devised to block Ward's admission. In an April 18, 1953, letter to law school dean J. Alton Hosch, Lenoir stated: "Although I am entirely in favor of a faculty adopting educational tests in an honest endeavor to raise educational standards, I am opposed to the prostitution of educational standards by the setting up of educational requirements which in reality are a subterfuge to attain some other end."[101]

Nonetheless, Ward was drafted into the Army less than thirty days before his court date.[102] His lawsuit challenging segregation at UGA would have to wait. Ward's supporters, including counselor Donald Hollowell, concluded that Governor Talmadge and other state officials had conspired to draft Ward into the Army to block his efforts to enter the state's law school.[103] After serving two years in the Army, including a tour of duty in Korea, Ward returned home and resumed his legal fight.[104] On August 25, 1955, with the help of Thurgood Marshall and Georgia attorneys Austin Thomas Walden and Donald Hollowell, Ward resumed his

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Bd. of Regents of the Univ. Sys. of Ga. 18–19 (Apr. 10, 1957) (on file with Archives, Univ. Sys. of Ga. Bd. of Regents Office, Atlanta, Ga.) (resolving to create additional requirements for law school applications).

[100] Minutes of the Meeting of the Bd. of Regents of the Univ. Sys. of Ga. 18–20 (Apr. 10, 1957) (on file with Archives, Univ. Sys. of Ga. Bd. of Regents Office, Atlanta, Ga.).

[101] Letter from James J. Lenoir, Professor, Univ. of Ga. Sch. of Law, to J. Alton Hosch, Dean, Univ. of Ga. Sch. of Law (Apr. 18, 1953). This letter comes from Lenoir's personal papers, copies of which were provided to the authors by Robert L. Lenoir of Tucson, Arizona, and Katie Lenoir Knepper of Sparks, Nevada, son and daughter of James J. Lenoir and Lora Deere Lenoir. The papers include personal letters and other documents related to Lenoir's stand against segregation and the actions of the Regents, University, and Law School to block the admission of Ward. Copies of papers are archived in the Foot Soldier Project Collection, Russell Library for Political Research and Studies, University of Georgia Libraries, Athens, Georgia.

[102] George M. Coleman, *NAACP Attorneys Move Fast to Save School Bias Suit: Horace Ward in Army; NAACP Lawyers Win Postponement*, ATLANTA DAILY WORLD, Sept. 22, 1953, at 1; *Draft Halts Ward's Suit for University Entry*, ATLANTA J., Sept. 22, 1953.

[103] Interview with Donald L. Hollowell, in Atlanta, Ga. (July 27, 1993).

[104] DANIELS, *supra* note 17, at 72.

case.[105] State officials responded with a number of stalling tactics.[106] Five years had elapsed since Ward first applied to the law school.[107] In the spring of 1956, Ward's fervent desire to attain a legal education and his concern that state officials might delay his case indefinitely led him to apply to Northwestern University School of Law.[108] Northwestern accepted him, and he entered the school that fall.[109]

Judge Frank A. Hooper heard Ward's case on December 17 to 20, 1956, and January 3, 1957.[110] During the trial, university officials characterized Ward as lacking the type of mind needed for the successful study of the law.[111] Dean Hosch voiced reservations about Ward's ability to succeed in either the study or practice of law.[112] Hosch testified that Ward's statements during an interview with a university committee were "evasive, inconsistent, and didn't show the type of mind that [Hosch] thought, and the committee thought an applicant should have to successfully pursue the study of law."[113] State attorneys also contended that since Ward was enrolled at Northwestern, his original application was invalid and university regulations required a transfer application to be considered for admission.[114]

Ultimately, despite convincing evidence demonstrating a disparity in the treatment of Ward's application compared to those

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[105] *Negro Renews Effort to Enter Law School*, ATLANTA J., Sept. 14, 1955, at 6.

[106] *See* Ed Hughes, *Ward Told to File New School Bid*, ATLANTA J., Feb. 20, 1956, at 1 (noting the Board of Regents sought to make Ward file a new application); *Regents Ask Removal of Ward Case*, ATLANTA J., July 9, 1956, at 2 (reporting that the attorney for the Board of Regents requested a later trial date).

[107] *See* Ward v. Regents of the Univ. Sys. of Ga., 191 F. Supp. 491, 492 (N.D. Ga. 1957) (noting that Ward filed his original application in September 1950).

[108] Margaret Shannon, *Justice at Last for Horace Ward*, ATLANTA J. & CONST., Mar. 13, 1977 (Magazine), at 8, 32, 34.

[109] DANIELS, *supra* note 17, at 92.

[110] Transcript of Record at 100, *Ward*, 191 F. Supp. 491 (No. 4355).

[111] *See* Transcript of Record at 174, *Ward*, 191 F. Supp. 491 (No. 4355); DANIELS, *supra* note 17, at 83; Report of the Univ. of Ga. Faculty Comm. on the Appeal of Horace T. Ward 7 (Sept. 13, 1951) (on file with Univ. of Ga. Libraries).

[112] Transcript of Record at 174, *Ward*, 191 F. Supp. 491 (No. 4355).

[113] *Id.* at 153.

[114] Thaddeus T. Stokes, *Ward Case Concluded; Judge Is Given Issue*, ATLANTA DAILY WORLD, Jan. 4, 1957, at 1.

of white applicants, Ward lost his case on February 12, 1957.[115] Basing his decision on technical grounds, Judge Hooper cited Ward's enrollment at another law school as his primary reason for ruling against Ward.[116] Hooper opined that Ward's entrance at Northwestern was clearly reason enough for the court to dismiss the case.[117] Hooper did not rule on whether Ward's application was denied due to his race.[118] The tenor of Hooper's decision is echoed in current racial discourse in the United States, which is characterized by avoidance, denial, and an emphasis on procedural arguments.[119]

After the Hooper decision, Ward returned to Northwestern and completed his law degree in 1959.[120] Upon his graduation, Hollowell invited Ward to join his law firm.[121] Ironically, Ward's first major case, *Holmes v. Danner*, was almost a carbon copy of his own lawsuit ten years earlier. Hamilton Holmes and Charlayne Hunter sought admission to UGA and—after an FBI-style interrogation by university officials—were eventually

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[115] *Judge Rules Against Ward's Bid to Enter Segregated School*, ATLANTA DAILY WORLD, Feb. 13, 1957, at 1.

[116] *Excerpts from Decision in the Ward Case*, ATLANTA J., Feb. 13, 1957, at 10.

[117] *See id.* (excerpting holding that the claims were moot).

[118] DANIELS, *supra* note 17, at 96.

[119] In *Parents Involved* the Supreme Court declined to recognize racial balancing, or the assigning of students to achieve racial integration, as a compelling state interest warranting the district to take race under consideration. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 702–03, 721 (2007). This shifted the emphasis of the case from the question of racial inequality and segregation to diversity and the procedure devised by the school district to assign students based on race. *Id.* at 727. Essentially, the ruling prioritizes the question of how race-conscious programs are implemented and whether they are sufficiently narrowly tailored to prevent a disparate impact on whites over the question of racial segregation, which is not unconstitutional if it is a function of de facto residential segregation and not a result of laws that discriminate against one group or another on the basis of race. *See id.* at 702–03, 727. What the ruling fails to consider, however, is the fact that racial segregation in schools is a function of residential segregation, which is inextricably linked to socioeconomic inequalities that are related to the legacy of Jim Crow laws, policies, and practices. The Court's logic sets a legal precedent for the allowance of racial segregation as long as it is not legally enforced by the state. More importantly, perhaps, this decision points to the limitations of the law in ensuring desegregation.

[120] DANIELS, *supra* note 17, at 118.

[121] HOLLOWELL & LEHFELDT, *supra* note 8, at 5.

rejected.[122] They filed suit on September 2, 1960, and asked for a speedy hearing in the U.S. District Court for the Middle District of Georgia on their motion for a preliminary injunction to prohibit the university from denying them admission due solely to their race.[123] As in Ward's case, the central issue was simply whether the university administered admissions in a racially discriminatory manner.[124]

A moment of poetic justice occurred in *Holmes* when Hollowell directed UGA President Aderhold to reveal to the court that a man he had described as lacking the mind to be a lawyer had not only graduated from Northwestern Law School and passed the bar but was at the lawyers' table as counsel for Holmes and Hunter.[125] Despite state and university officials' insistence that Holmes and Hunter were not rejected due to their race, NAACP counsel Motley, Ward, and Hollowell, with the help of law clerk Vernon Jordan, presented incontrovertible evidence supporting the plaintiffs' claim of racial discrimination.[126] On January 6, 1961, Judge William A. Bootle ordered the immediate admission of Holmes and Hunter.[127] Bootle declared, "Had plaintiffs been white applicants to the University of Georgia both would have been admitted to the university not later than the beginning of the fall quarter, 1960."[128] Despite a barrage of appeals and even a threat

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[122] *See* Holmes v. Danner, 191 F. Supp. 394, 407–08 (M.D. Ga. 1961) (listing series of questions posed to Holmes in his interview "which had probably never been asked of any applicant before"); Interview with Hamilton E. Holmes, in Atlanta, Ga. (Feb. 24, 1995).

[123] Anne S. Emanuel, *Turning the Tide in the Civil Rights Revolution: Elbert Tuttle and the Desegregation of the University of Georgia*, 5 MICH. J. RACE & L. 1, 14 (1999); *see also* DANIELS, *supra* note 17, at 123.

[124] Constance Baker Motley, *Remarks on Holmes-Hunter Lecture*, 5 HARV. BLACKLETTER J. 1, 5 (1988); Interview with Constance Baker Motley, in N.Y.C., N.Y. (Mar. 30, 1995).

[125] Transcript of Record at 143–46, *Holmes*, 191 F. Supp. 394 (No. 450) (on file with Fed. Records Ctr., East Point, Ga.); *see also* Interview with Hamilton E. Holmes, in Atlanta, Ga. (Feb. 24, 1995); *Hamilton Earl Holmes: The Legacy Continues* (Georgia Public Television broadcast Jan. 25, 2004).

[126] *See Holmes*, 191 F. Supp. at 401–09; VERNON E. JORDAN, JR. WITH ANNETTE GORDON-REED, VERNON CAN READ!: A MEMOIR 138–43 (2001); Interview with Vernon E. Jordan, Jr., in Washington, D.C. (Feb. 28, 1997).

[127] *Holmes*, 191 F. Supp. at 410.

[128] J.W. PELTASON, FIFTY-EIGHT LONELY MEN: SOUTHERN FEDERAL JUDGES AND SCHOOL DESEGREGATION 114 (1961).

by then-Governor Ernest Vandiver to close the university in response to the court order, Fifth Circuit Court of Appeals Judge Elbert Tuttle and, ultimately, the U.S. Supreme Court affirmed Bootle's ruling.[129] Bootle subsequently issued an order forbidding Governor Vandiver from closing the university.[130]

Bootle found that university officials had rigged the admissions process to block Holmes's and Hunter's applications.[131] In his opinion, Bootle noted that Aderhold had denied Ward admission to the law school ten years earlier based on "evasive, inconsistent and contradictory" statements, almost the same thing said about Holmes in the *Holmes* case.[132] Hamilton E. Holmes and Charlayne Hunter crossed the 175-year-old color line at the University of Georgia on January 9, 1961.

The *Holmes* victory represented a major turning point for democracy in Georgia. Notably, Mary Frances Early was admitted to graduate school at UGA a few months following the admission of Holmes and Hunter, and on August 16, 1962, Early became the first black student to graduate from UGA.[133]

The *Holmes* triumph also had an impact beyond UGA. In Fall 1961, the Atlanta Public Schools admitted their first black students to previously all-white schools,[134] and in the same year, Georgia Institute of Technology opened its doors to black students.[135] One year later the Georgia State College of Business (now Georgia State University) admitted its first black students.[136] The momentum created by the desegregation of Georgia's flagship

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[129] *See* Danner v. Holmes, 364 U.S. 939 (1961) (denying motion to vacate Judge Bootle's ruling); *see also* ANNE EMANUEL, ELBERT PARR TUTTLE: CHIEF JURIST OF THE CIVIL RIGHTS REVOLUTION 189–90 (2011); Emanuel, *supra* note 123, at 5; Interview by Clifford Kuhn with Judge Elbert Tuttle 24–25 (Apr. 10, 1992) (on file with Ga. State Univ. Special Collections).

[130] Interview with William A. Bootle in Macon, Ga. (June 14, 2000).

[131] *Holmes*, 191 F. Supp. at 402.

[132] *Id.* at 408.

[133] Andrea Jones, *Pioneer at UGA May Get His Due*, ATLANTA J.–CONST., Feb. 18, 2007, at A1.

[134] Alton Hornsby, Jr., *Black Public Education in Atlanta, Georgia, 1954–1971: From Segregation to Segregation*, 76 J. NEGO HIST. 21, 21–29 (1991).

[135] BENJAMIN GRIESSMAN, SARAH JACKSON & ANNIBEL JENKINS, IMAGES AND MEMORIES OF GA TECH: 1885–1985, at 208 (1985).

[136] *Ga. State Admits First Negro*, ATLANTA INQUIRER, June 23, 1962.

institution also influenced other leading public and private colleges in the Deep South.[137] Shortly after the *Holmes* victory, despite grandstanding by Governors Ross Barnett and George Wallace and the accompanying riotous mobs, the University of Mississippi in 1962 and the University of Alabama in 1963 admitted their first black students.[138]

Holmes, Hunter, and Early—along with their families, their lawyers, and the lesser-known foot soldiers who supported their struggles, as well as the fair-minded judges who ruled in their favor—should rightly be celebrated for helping to realize the promise of democracy. So it is indeed fitting to pause on this Fiftieth Anniversary to reflect on the desegregation of UGA and its impact on diversity and inclusiveness in Georgia and nationwide. It is equally important, however, to set goals that chart a course to greater diversity, inclusiveness, and equality.

From Holmes, Hunter, Early, and others, we learn that the true patriot is one who refuses to accept injustice and who, even at great personal risk, engages in creative forms of resistance for the cause of freedom, equality, and democracy. Holmes and Hunter encountered open hostility and violence in response to their presence at UGA.[139] A riot erupted outside Hunter's dormitory room during her first night on campus, and although she was unharmed, rocks and other objects were thrown at her room, fires were ignited, windows were broken, and belligerent crowds chanted racial insults.[140]

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[137] *See, e.g.*, Emory Univ. v. Nash, 127 S.E.2d 798, 799 (Ga. 1962) (discussing desegregation of Emory University); MOTLEY, *supra* note 57, at 162–92 (discussing desegregation of the University of Mississippi); PHINIZY SPALDING, THE HISTORY OF THE MEDICAL COLLEGE OF GEORGIA 209–10 (1987) (chronicling desegregation at the Medical College of Georgia in 1967); Alan Scot Willis, *A Baptist Dilemma: Christianity, Discrimination, and the Desegregation of Mercer University*, 80 GA. HIST. Q. 595, 611 (1996) (noting that the integration of Mercer University in 1963 brought it in line with UGA).

[138] *See* CLARK, *supra* note 57; EAGLES, *supra* note 57; DAVID G. SANSING, THE UNIVERSITY OF MISSISSIPPI: A SESQUICENTENNIAL HISTORY 281 (1999).

[139] Press Release, NAACP, NAACP Deplores Campus Mob Action in Georgia (Jan. 12, 1961) (on file with author).

[140] CHARLAYNE HUNTER-GAULT, IN MY PLACE 182–83, 189 (1992); Robert Cohen, *"Two, Four, Six, Eight, We Don't Want to Integrate": White Student Attitudes Toward the University of Georgia's Desegregation*, 80 GA. HIST. Q. 616, 617–19 (1996).

After the riot, William Tate, dean of students, suspended several students.[141] One student, arguing for reinstatement, conveyed a poignant lesson that reflects the importance of moral authority among our leaders. His words resonate as powerfully today as they did fifty years ago. In his letter to Dean Tate, he wrote:

> I will admit that the integration of the University went contrary to everything I have ever been taught. I know, for a while, my feelings were other than temperate—just as the feelings and acts of the Georgia Legislature, three Governors, and the vast majority of the Citizens of Georgia have been far from temperate on the integration subject. . . . I do not believe, however, that I have been any slower in accepting the situation than has the group enumerated above. Certainly, I should not be held to a higher standard in my youth than these men of experience and maturity.[142]

The tone and candor of this student's letter level an indictment against the systemic cultural and institutional racism that characterized the state-sponsored discrimination against African-Americans. The student's argument offers insight into what desegregation represented to generations of white Americans raised under the tyranny of Jim Crow. This young man's letter encapsulates the lessons we should bear in mind when we think about the kind of country we want our children to inherit.

Despite the racial tensions, Holmes and Hunter both graduated from the UGA in 1963.[143] Holmes, elected to Phi Beta Kappa, went on to become a highly respected orthopedic surgeon,[144] while Hunter has achieved both fame and professional success as a

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[141] PRATT, *supra* note 17, at 95–96.

[142] Letter from Cecil G. Davis, Former Univ. of Ga. Student, to William Tate, Dean of Men, Univ. of Ga. (Jan. 23, 1961) (on file with the Univ. of Ga. Libraries).

[143] HUNTER-GAULT, *supra* note 140, at 244–46.

[144] *Id.* at 244, 247.

journalist.[145] Early went on to have a distinguished career in music education.[146]

IV. REFRAMING THE DISCUSSION OF AFFIRMATIVE ACTION

As Derrick Bell contends, the extent to which African-Americans have gained access to institutions that allow them to compete in American economic and political life has historically been contingent upon the level of interest-convergence between African-Americans and white Americans.[147] Periods of greater interest-convergence have been marked by increased access to education, levels of political participation, and de jure legal protections for the civil rights of African-Americans. At the civil and institutional levels, programs such as affirmative action have enabled the progressive gains of the modern-day civil rights movement to take root within American culture.

However, the erosion of affirmative action, accompanied by mass incarceration and the resulting political disenfranchisement of large segments of the African-American community, suggest that the gains of the civil rights movement are not only threatened, but are particularly vulnerable to being lost. Moreover, the contemporary debate over the definition and implementation of affirmative action supports Bell's argument that the social advancement or inclusion of underrepresented racial groups has always depended upon a convergence of interests between these groups and the perceived interests of white Americans.[148] For social programs like affirmative action to have a positive, meaningful, and lasting impact on decreasing social inequalities, institutional inclusion must not be perceived to come at the expense of white America. To overcome the political reality of interest-convergence and the sense of entitlement associated with white privilege, the discussion of affirmative action must be

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[145] DANIELS, *supra* note 17, at xii.

[146] *Id.* at 158, 162–63.

[147] *See* BELL, *supra* note 20, at 49–58.

[148] *See* MOISES F. SALINAS, THE POLITICS OF STEREOTYPE: PSYCHOLOGY AND AFFIRMATIVE ACTION 16–20 (2003).

reframed in ways that emphasize social inequalities in education and wealth, which are inextricably linked to the historic and contemporary relationship between race and class in American society.

Coupled with the history of racialized political inequality, America's cultural investment in the ideology of liberal individualism makes honest conversation about systemic racism difficult at best. In the absence of sustained public discourse acknowledging the reality of institutionalized racism, the debate over affirmative action will continue to be framed in ways that misrepresent the central issue: racial inequality. When we discredit the impact of Jim Crow segregation and lingering racism in American society, we preemptively make the consideration of race tantamount to racial discrimination. "For example," writes Professor Emilye Crosby, "a majority of the Supreme Court seems unable to distinguish between legally-required segregation in the service of white supremacy and race-conscious policies designed to offset the pernicious legacies of state-sponsored inequality."[149]

The Court's inability to recognize this distinction makes the very subject of race anathema to the ideal of American democracy in a nation that ignores the legacy of racial discrimination and mandates legal and political colorblindness with regard to continuing inequalities. Operating under the guise of liberal individualism, colorblind racism not only masks socially significant variables that impact marginalized communities; it also conflates causes and effects, such that the consideration of race is viewed as the cause of racism, when in fact past racial injustices—such as "legally-required segregation in the service of white supremacy"—warrant the consideration of race. Indeed, the very construction of race in American social history warrants its critical reconsideration within the context of affirmative action.

As racial demographics shift, ensuring diversity at all levels of American society becomes ever more important to establish a just and equal society and to guarantee our ability to compete in a global economy. However, diversity is not, nor should it be, the

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[149] EMILYE CROSBY, CIVIL RIGHTS HISTORY FROM THE GROUND UP: LOCAL STRUGGLES, A NATIONAL MOVEMENT 15 (2011).

primary moral, rhetorical, or legal justification for affirmative action. Unfortunately, "as the beneficiaries of affirmative action have increased," writes Steven A. Holmes, "its moral rationale has changed. Supporters now speak as much of achieving diversity in a work force or on a college campus as they do of making up for past racism or preventing current discrimination. But while diversity may be a noble goal, it does not necessarily mesh with the original idea of affirmative action: helping to overcome the vestiges of slavery and Jim Crow."[150] In allowing diversity to serve as the primary justification for affirmative action, proponents of the initiative sacrifice the principles of justice and equality on the altar of ephemeral political expediency. Paradoxically, then, the contemporary emphasis on diversity within public discourse on race in higher education has become a means of evading the realities of race and class inequality in American society.

Furthermore, it is hypocritical to argue that the jurisprudence of the Supreme Court—which was responsible for sanctioning and perpetuating racial inequalities during the Jim Crow era, but later played a significant role in changing exploitive institutions during the modern civil rights movement[151]—cannot or should not account for the existence of racism in its interpretation of the law. Such arguments are ahistorical and fallacious, especially in light of the statements of former Supreme Court Justice William H. Rehnquist, who wrote in a 1952 memo prepared for Justice Robert H. Jackson, "I realize it is an unpopular and unhumanitarian position, for which I have been excoriated by 'liberal' colleagues, but I think *Plessy v. Ferguson* was right and should be reaffirmed."[152]

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[150] Steven A. Holmes, *Defining Disadvantage Up to Preserve Preferences*, *in* SEX, RACE, AND MERIT: DEBATING AFFIRMATIVE ACTION IN EDUCATION AND EMPLOYMENT 32–33 (Faye J. Crosby & Cheryl VanDeVeer eds., 2000).

[151] *See* DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY AND POVERTY 351–57, 414–19 (2012) (discussing the influence of Supreme Court jurisprudence on society and race).

[152] Adam Liptak, *New Look at an Old Memo Casts More Doubt on Rehnquist*, N.Y. TIMES (Mar. 19, 2012), *available at* http://www.nytimes.com/2012/03/20/us/new-look-at-an-old-memo-casts-more-doubt-on-rehnquist.html?_r=1. *See generally* Brad Snyder & John Q. Barrett, *Rehnquist's Missing Letter: A Former Law Clerk's 1955 Thoughts on Justice Jackson and Brown*, 53 B.C. L. REV. 631 (2012) (examining how this letter offers insight into how Rehnquist viewed the Warren Court).

Rehnquist's memo not only indicated his support for the 1896 decision that "separate but equal" facilities were constitutional, but also demonstrated the way in which his interpretation of the law, albeit as a clerk for Justice Jackson, was informed by his recognition and subsequent disregard of the fact that racial segregation is "unhumanitarian." Rehnquist's abstract belief in symmetrical treatment under the law allowed him to argue that "separate but equal" should be "reaffirmed," despite his own admission that such a position is morally reprehensible. Rehnquist's willingness to ignore the realities of racism that made racial separation fundamentally unequal in 1952 is consistent with the Supreme Court's refusal to account for the existence of racial inequality in its deliberations on the constitutionality of affirmative action today.

Despite the historic *Brown v. Board of Education* decision, a majority of Justices on the Supreme Court in recent years have either ignored or refused to acknowledge the historical legacy and persistence of racism in their interpretation of the Constitution. Collectively, such jurisprudence may be characterized as a willful evasion of social facts in favor of post-racial fictions that provide the idealized constitutional basis for the legal erosion of affirmative action. This erosion is the hallmark of colorblind racism, which may be defined simply as the attempt to rationalize racial inequality by ignoring race altogether. Ultimately, the constitutionality of affirmative action raises the greater question of how the intent or spirit of the U.S. Constitution should be interpreted, a question that can only be answered by the Justices themselves.[153]

The conversation around race in America is always political, but it need not be ideological. Where clear disparities persist, we should work collectively to correct them—regardless of whether their root causes are racial and without engaging in knee-jerk accusations of individual racism. To engender a genuinely post-racial society, inequities created by centuries of racial inequality must be addressed first. This cannot be achieved by ignoring race

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[153] *See generally* LAURENCE H. TRIBE, THE INVISIBLE CONSTITUTION (2008).

in favor of colorblindness or racial neutrality. "That race should be irrelevant is certainly an attractive ideal," writes Professor Charles Mills, "but when it has not been irrelevant, it is absurd to proceed as if it had been."[154] Professor Eduardo Bonilla-Silva's analysis of how colorblind racism enables the persistence of racial inequality in the United States further demonstrates that race-neutral policies contribute to the creation of legally invisible forms of discrimination.[155] This invisibility functions within the ideological framework of liberal individualism advanced by post-civil rights era conservatives for whom "race now means racism, especially when it is used to define or defend the interests of a minority community."[156]

Overcoming racial inequality cannot be achieved by treating diversity as its proxy or as a social panacea. To ensure racial equality, we must recognize the inextricable relationship between the realities of race and class in every facet of American society and create social policies grounded in this reality. Once greater systemic equality is achieved and we no longer use the most fortunate among us as counter-factual examples in obtuse arguments against the existence of racism, perhaps the very idea of race can be replaced by a genuine understanding of human difference and variation. Until then, however, racial consideration is necessary to ensure equal opportunity and proportional representation in higher education.

V. CONCLUSION

On August 6, 1965, President Lyndon Johnson signed the Voting Rights Act. On the same day, speaking from the President's Room of the Capitol Rotunda, Johnson reflected on the racial oppression of black Americans:

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[154] CHARLES W. MILLS, BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE 41 (1998).

[155] *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES 25–32, 47–48, 177–79 (2003).

[156] *See* NIKHIL PAL SINGH, BLACK IS A COUNTRY: RACE AND THE UNFINISHED STRUGGLE FOR DEMOCRACY 10–14 (2005).

> It is nothing less than granting every American Negro his freedom to enter the mainstream of American life. . . . For centuries of oppression and hatred have already taken their toll. It can be seen, throughout our land in men without skills, in children without fathers, in families that are imprisoned in slums and in poverty.[157]

Nothing demonstrates the legacy of institutionalized oppression in the United States more clearly than the dramatic history of racial segregation in higher education, whereby state-sanctioned policies barred African-Americans like Horace T. Ward from many prominent state-supported colleges and universities. The centuries of oppression that excluded African-Americans from many educational opportunities and the intervening years of benign neglect can be seen in the gross racial disparities in higher education today. Notwithstanding the triumphs in desegregation that many institutions of higher education made during the twentieth century, as examined in this Essay, and despite subsequent racial progress, there continues to be a disproportionately low number of African-American students and faculty in higher education, and uneven levels of educational attainment and graduation rates for African-American students as compared to their white counterparts.[158] Clearly, the morally reprehensible state-sanctioned segregation in American higher education has taken its toll.

With roots as far back as President Franklin Roosevelt's 1941 Executive Order 8802, which forbade discrimination in employment in defense industries and government on the basis of

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[157] Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act, 2 PUB. PAPERS 409 (Aug. 16, 1965).

[158] *See* NAT'L CTR. OF EDUC. STATISTICS, U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS: 2010, at 24–25 tbl.8, 26–27 tbl.9, 28 tbl.10, 29 tbl.11, 30–31 tbl.12, 33 tbl.14 (2011) (charting educational attainment data); KUL B. RAI & JOHN W. CRITZER, AFFIRMATIVE ACTION AND THE UNIVERSITY: RACE, ETHNICITY, AND GENDER IN HIGHER EDUCATION EMPLOYMENT 36–41 (2000); *see also Features: Black Student College Graduation Rates Remain Low, But Modest Progress Begins to Show*, J. BLACKS IN HIGHER EDUC., http://www.jbhe.com/features/50_blackstudent_gradrates.html (comparing 2005 graduation data with prior years).

race, creed, color, or national origin,[159] the Civil Rights Act of 1964 laid the foundation for affirmative action policy.[160] Affirmative action programs were designed to reverse the effects of a long history of overt discrimination.[161] For example, the programs extended minorities and women preference in employment and university admissions to compensate for past and present discrimination. As a result, affirmative action policies were responsible for briefly expanding black enrollment at major colleges and universities starting in the late sixties.[162]

Affirmative action programs and the accompanying gains in black enrollment were short-lived, however, due in part to the *Bakke* decision.[163] The Court regarded the University's denial of Allan Bakke, an unsuccessful medical school applicant, in order to increase the number of minority students as "reverse discrimination."[164] The ruling was a major obstruction in the struggle to achieve equity and parity. Justice Thurgood Marshall, in his dissent from the majority opinion, opined that America was not even close to becoming a color-blind society: "The dream of America as a great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot."[165] Marshall's colleague, Justice Harry Blackmun, summed it up simply, but profoundly: "In order to get beyond racism, we must first take account of race."[166]

From a moral standpoint, in light of the overt, state-sponsored history of discrimination at institutions of higher education, it is imperative to renew the consideration of race in college

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[159] Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

[160] For a brief history of affirmative action, see RAI & CRITZER, *supra* note 158, at 1–8.

[161] THOMAS C. HOLT, CHILDREN OF FIRE: A HISTORY OF AFRICAN AMERICANS 356 (2010)

[162] *See* Robin D.G. Kelley, *Into the Fire: 1970 to the Present*, *in* TO MAKE OUR WORLD ANEW: A HISTORY OF AFRICAN AMERICANS 543, 565, 567 (Robin D.G. Kelley & Earl Lewis eds., 2000).

[163] *See supra* notes 31–32, 44 and accompanying text.

[164] *Id.* at 572–73; *see also* SALINAS, *supra* note 148, at 27–30. According to Salinas, "There is no evidence of systemic discrimination against whites in higher education admissions." *Id.* at 29.

[165] Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 400–01 (1978) (Marshall, J., dissenting).

[166] *Id.* at 407 (Blackmun, J., dissenting).

admissions. Justice in America will never be fully achieved until it includes the principle of racial justice. This requires race-conscious policies to mitigate the legacy of state-sanctioned racial discrimination and its lingering effects.

Affirmative action policies are one way to acknowledge the persistence of racial inequality and take action to affirm the value of racial justice. Such affirmation requires the corrective consideration of race, as illustrated by the struggle to desegregate UGA and other institutions of higher education. In an environment where race cannot be invoked as a compelling justification for desegregation,[167] our ability to achieve Reverend Dr. Martin Luther King Jr.'s vision of racial and economic justice will continue to be hampered by the failure to address social inequality, a fundamental moral concern.[168]

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[167] *See supra* notes 23–29 and accompanying text.

[168] *See* Eric Foner, *Stolen Dream: Would Martin Luther King Really Be Against Affirmative Action?*, SLATE (July 27, 1996), http://www.slate.com/articles/news_and_politics/hey_wait_a_minute/1996/07/stolen_dream.html (arguing that Dr. King would support affirmative action); *see also* Eric Foner, *Hiring Quotas for White Males Only*, NATION, June 26, 1995, at 924–26 (explaining that Dr. King was a strong supporter of affirmative action and that he had outlined arguments in favor of affirmative action in his final book, WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 95 (Boston: Beacon Press, 1968) (1967).