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**FITTING SQUARE PEGS INTO ROUND
HOLES: HOW RACE-BASED AFFIRMATIVE
ACTION IN HIGHER EDUCATION
ADMISSIONS IS AN INADEQUATE AND
INEQUITABLE MEANS TO AN END**

JUSTIN C. ADAY*

I. INTRODUCTION

We have all probably heard the old adage, “It’s like trying to fit a square peg into a round hole.” With this statement, we assume that because of the incompatibility of the shapes, the square peg cannot fit into the round hole. If this is the case, then how can the square peg fit into the round hole? There are three possibilities: make the hole bigger, make the peg smaller, or both. This simple quandary translates into the dilemma created by race-based affirmative action schemes in higher education admissions.

To illustrate the analogy, we must assign the roles of the round hole and the square peg. The round hole is the institutional goals and admission standards of the higher education institution, and the square peg is the applicant given preference and ultimately admitted by the race-based affirmative action scheme. Both possibilities—making the hole bigger and making the peg smaller—will overcome the assumption of incompatibility. In other words, race-based affirmative action forces institutions of higher education to alter their institutional goals and admission standards, and the

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preference shown by the affirmative action scheme reduces any true merit possessed by a preferentially-treated applicant.

Proponents of race-based affirmative action primarily defend the practice as a means of curing instances of past discrimination and attaining or maintaining diversity in the educational setting.¹ After assessment of these stated goals, many similarities arguably exist. The most compelling similarity, however, is that each goal is an “end,” and race-based affirmative action is simply a means to an end (or, in this case, ends). Theoretically, at some point in time, we should reach those ends. This paper, however, will show that we will never reach those ends if race-based affirmative action is the means to the ends and, further, that affirmative action will only survive if we never reach the ends.

Part II will present a hypothetical situation of a law school admissions director charged with selecting the final two applicants to enter a class of one hundred students. Four applicants remain, and the admissions director must employ the law school’s affirmative action scheme in her selection. Part III will analyze the history and legal framework of affirmative action, including antidiscrimination laws and Supreme Court decisions that have allowed the introduction of race-based affirmative action and sustained the practice despite its many critics.

Next, Part IV will present two theories that appeal to proponents of race-based affirmative action, as possible defenses of the practice. First, John Rawls’s hypothetical “original position” will be evaluated.² Rawls suggests that members of society should collectively agree upon principles behind a “veil of ignorance,” without knowledge of their own position in society relative to other members of society.³

¹ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 281 n.14 (1978) (acknowledging the University’s special admissions program aimed to increase minority enrollment); *Gratz v. Bollinger*, 539 U.S. 244, 265 (2003) (University’s policy has a stated goal of diversity); *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003) (Law School’s policy aspires to achieve diversity).

² JOHN RAWLS, *A THEORY OF JUSTICE* 17–22 (Harvard Univ. Press 1971).

³ *Id.* at 136–42.

Second, the extreme Critical Race Theory will be examined, which holds that racism is permanent and the pursuit of racial equality is futile.⁴

Finally, Part V will revisit the law school admissions hypothetical presented in Part II, reveal the decisions made by the admissions director based on the mandate to use the law school's affirmative action scheme, and highlight the inequities that exist not only in the hypothetical, but also in real-life scenarios analogous to the hypothetical. In addition, this section will present possible alternatives to race-based affirmative action. From these alternatives, a more realistic and equitable cure will be chosen for the ills for which race-based affirmative action provides only a marginal treatment.

II. HYPOTHETICAL: THE UNENVIABLE POSITION OF THE LAW SCHOOL ADMISSIONS DIRECTOR

Imagine an admissions director of a law school, vested with the authority of selecting an entering law school class from a pool of applicants much larger than the number of students actually selected.⁵ She must base her decisions on the institutional goals and admission standards formulated by the law school faculty. The institutional goals include maintaining the prestige of the law school, developing law students into productive lawyers and members of society, and giving the chance of a legal education to students from all socio-economic backgrounds. Likewise, the admission standards include exceptional performance in undergraduate coursework, competitive Law School Admission Test (LSAT) scores, and participation in a wide range of extracurricular activities.

⁴ CRITICAL RACE THEORY: THE CUTTING EDGE XVI (Richard Delgado & Jean Stefancic eds., 1995).

⁵ This hypothetical uses a law school setting for no particular reason. The same hypothetical could apply to the admissions process for any institution of higher education. For purposes of simplicity, the authority of selecting applicants has been vested in a single individual, but, in a real world scenario of this type, several individuals who make up an admissions committee often make these decisions.

The entering class will consist of one hundred students from across the country. Of the one hundred students, the admissions director has already selected ninety-eight, and the law school dean has approved their admission. From the once large pool of applicants, there remain only four applicants for the two seats that she must fill. Of the ninety-eight students chosen thus far, none has an undergraduate grade point average (GPA) lower than 3.7 (on a 4.0 scale), or an LSAT score lower than 162 (on a 180 point scale). In addition, the students chosen thus far are from all regions of the country, and come from diverse socio-economic backgrounds.

Despite the admissions criteria described above, the dean of the law school has instructed the admissions director to use the school's affirmative action policy when selecting from the remaining applicants. The dean shares with her that the president of the law school's parent university has pressured the law school to employ the affirmative action scheme for these final selections, because the president of the parent school does not feel comfortable with the racial distribution of the students chosen thus far, despite the enormous diversity of those selections in non-race areas.

The law school modeled its rarely-used affirmative action policy after the University of Michigan Law School affirmative action policy. The law school adopted the policy with the primary objective of promoting a diverse student body. As a member of the committee that formulated the affirmative action policy, the admissions director knows that the policy actually seeks to achieve racial diversity. Thus, the dean directs the admissions director to evaluate the final four applicants according to the admissions criteria used to evaluate all other applicants, while giving preference to applicants from disadvantaged racial groups. These groups specifically include African Americans, Native Americans, and Hispanics. Based on these modified criteria, the admissions director begins evaluating the four remaining applicants.⁶

⁶ The gender of each applicant has been revealed in their profile, but for purposes of preference given to the applicants in the hypothetical, gender is of no consequence.

A. Applicant A

Applicant A is a twenty-two year old African American male. He attended a small private liberal arts college, and received a bachelor's degree with a double major in Art and Music. He earned an undergraduate grade point average of 3.4, and he made a 155 on the Law School Admission Test. Applicant A seems to have a natural academic ability, but he often earned lackluster undergraduate grades because he spent more time in college participating in fraternity events and traveling to away games as a member of the school's football and basketball teams.

Applicant A's father works as a physician, and his mother works as an attorney in private practice. He is a fourth-generation college graduate, and will be a third-generation law school student, if accepted. Applicant A used an athletic scholarship to finance his undergraduate education. When reviewing Applicant A's application, the admissions director read two letters of recommendation—one from his college football coach, and the other from the governor of his home state, a personal friend of Applicant A's family and former partner of his mother's law firm.

B. Applicant B

Applicant B is a twenty year old Native American female. She attended an Ivy League university, and received a bachelor's degree in Physics. She earned an undergraduate grade point average of 3.4, and she made a 155 on the Law School Admission Test. Instead of studying and applying herself, Applicant B spent much of her time in college traveling around the country participating in Native American tradition festivals.

Applicant B's father owns and operates several casinos, and currently serves as chairman of the National Association of Native American Gamers (NANA-Gs). Her mother serves as the chief financial officer of the chain of casinos owned by her family. Applicant B is a third-generation college graduate, and her family covered all costs associated with her undergraduate studies. She submitted recommendation letters

from two world-renowned scholars who serve as distinguished professors at the Ivy League university.

C. Applicant C

Applicant C is a twenty-one year old Caucasian male. He received a chemistry degree from a public state university. Applicant C earned an undergraduate grade point average of 3.65, and he made a 160 on the Law School Admission Test. Applicant C spent most of his undergraduate days in the library or the chemistry lab. Distraction from a minor learning disability required Applicant C to spend more time studying and preparing for assignments than most of his classmates.

Applicant C's father works as a carpenter and his mother is a homemaker. He is a first-generation college graduate, although his father completed several trade school courses. He worked throughout college to pay his living expenses, and he used student loans to pay his tuition. Applicant C submitted one letter of recommendation from a college professor whose chemistry lab he worked in during his senior year of college. His high school chemistry teacher, who took a special interest in Applicant C's ability in her chemistry class, wrote his other letter of recommendation.

D. Applicant D

Applicant D is a twenty-two year old Caucasian male. He attended community college for two years before entering a regional public university near his home. He received a degree in political science. Applicant D earned an undergraduate grade point average of 3.4, and he made a 155 on the Law School Admission Test. He is a first-generation college graduate, and devoted all of his collegiate free time to studying, preparing for class, and tutoring sessions conducted by his neighbor.

Throughout college, Applicant D lived with his mother, a high school dropout, who works as a convenience store clerk. Applicant D's mother and father, high school sweethearts who began living together at age eighteen, were never

married. His father left his mother when he found out she was pregnant with Applicant D, and he has never been a part of Applicant D's life. Applicant D paid his college expenses through a Pell Grant and student loans. With his law school application, Applicant D submitted letters of recommendation from a college professor and the pastor of his church.

III. HISTORY AND LEGAL FRAMEWORK OF AFFIRMATIVE ACTION

A. *The Beginning: From Simple Command to Difficult Legal Questions*

There is little doubt that racial discrimination and its negative effects have plagued the United States for most of its history. This country has witnessed both facially discriminatory laws and facially neutral laws with discriminatory effects. Despite the harsh reality of racism and racial discrimination in this country, there still exists definite disagreement about the degree of racial discrimination present in the United States today, whether the traditional majority can experience discrimination, and the best solution to the problems posed by racial discrimination.

Those disagreements that Americans have about discrimination are likely the same ones had, albeit more definite, when President Kennedy issued Executive Order 10,925 on March 6, 1961.⁷ Among other things, the order "prohibited discrimination and required contractors to pledge to take *affirmative action* to ensure that applicants for employment be considered *without regard to race*."⁸ Certainly, those disagreements still existed when Congress passed the Civil Rights Act of 1964 on July 2, 1964.⁹ Specifically, Title VI of the act states "*No person* in the United States shall, on the ground of race, color, or national

⁷ Exec. Order No. 10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961).

⁸ Carl E. Brody, Jr., *A Historical Review of Affirmative Action and the Interpretations of its Legislative Intent By the Supreme Court*, 29 AKRON L. REV. 291, 302 (1996) (emphasis added).

⁹ Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-2000h (2000).

origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹⁰

These are only two instances of the many attempts to combat racial discrimination in the United States. Each attempt to address the problem, however, is often overshadowed by a more vigorous attempt to define the problem. Many define it as racial discrimination against only one group—African Americans. Likewise, those same people see the solutions, such as those proposed by Executive Order 10,925 and Title VI of the Civil Rights Act of 1964, only as mechanisms to eliminate discrimination against African Americans.¹¹

Plain language interpretation of the solutions, however, may better illustrate the intent behind their introduction. First, Executive Order 10,925 prohibited the federal government from considering race as a factor in contracting or employment decisions.¹² Second, Title VI of the Civil Rights Act of 1964 states that “no person” shall be discriminated against on the basis of race.¹³ Neither the Executive Order nor Title VI mentions a particular race, or prescribes protections to a particular race.

There is little doubt that most antidiscrimination protections instituted during the Civil Rights movement were for the benefit of African Americans. African Americans benefited, however, simply because they had previously lacked the protections that the antidiscrimination mechanisms provided. Thus, they were only the immediate beneficiaries. That does not mean that African Americans, or any other racial group, are the only current beneficiaries, or that they were ever considered the exclusive beneficiaries of any antidiscrimination protections. The disagreements about racial discrimination and the role of race-based affirmative action in higher education admissions, particularly the protections granted by the antidiscrimination laws of the

¹⁰ *Id.* (emphasis added).

¹¹ See Brody, *supra* note 8, at 302–03.

¹² Exec. Order 10,925, *supra* note 7.

¹³ Civil Rights Act of 1964, *supra* note 9.

United States and the identity of the protected, are still present today. The cases that follow best illustrate the evolution of those disagreements.

B. Regents of the University of California v. Bakke

The Medical School at the University of California at Davis (hereinafter “Medical School”) opened in 1968, and admitted no African Americans, Hispanics, or Native Americans through the general admission program in the inaugural class.¹⁴ Within five years of admission of the first class, the Medical School faculty developed a special admissions program to increase the number of “disadvantaged” students admitted.¹⁵ The Medical School never defined the term “disadvantaged” and, despite its original purpose, the special admission program evolved into separate admissions program for select minority groups, and ultimately into a racial quota system.¹⁶ Applicants were recommended to the special admissions program “until a number prescribed by faculty vote were admitted.”¹⁷ In 1973 and 1974, the class size was 100 and the prescribed number of special admissions was sixteen.¹⁸

Allan Bakke, a white male, applied to the Medical School in 1973 and 1974.¹⁹ In both years, the Medical School considered Bakke under the general admission program and granted him an interview with a member of the admissions

¹⁴ *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 272 (1978).

¹⁵ *Id.*

¹⁶ *Id.* at 274–75. “Although disadvantaged whites applied to the special program in large numbers, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only ‘disadvantaged’ special applicants who were members of one of the designated minority groups.” *Id.* at 276 (citations omitted). “For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white.” *Id.* at 275 n.5 (citations omitted).

¹⁷ *Id.* at 275.

¹⁸ *Id.*

¹⁹ *Id.* at 276.

committee.²⁰ After these interviews, the admissions committee denied Bakke's admission both years, despite the availability of slots in the special admission program and the admission of applicants through the special admissions program with qualifications inferior to those of Bakke.²¹ Bakke commenced a suit against the Medical School and "alleged that the Medical School's special admission program operated to exclude him from the school on the basis of his race."²² The trial court and the Supreme Court of California agreed that the Medical School's special admission program operated as a racial quota, but the courts disagreed about whether to compel the Medical School to admit Bakke.²³ The Supreme Court of the United States "granted certiorari to consider the important constitutional issue."²⁴

Applying a strict scrutiny analysis, the Court stated that "in order to justify the use of a suspect classification, [the Medical School] must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary...to the accomplishment' of

²⁰ *Bakke*, 438 U.S. at 276.

²¹ *Id.* at 276–77.

²² *Id.* at 277–78. In addition to constitutional and statutory claims, Bakke sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. *Id.* at 277. The Medical School "cross-complained for a declaration that its special admissions program was lawful." *Id.* at 278.

²³ *Id.* at 279. "[T]he trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program." *Id.* The California Supreme Court "ruled that since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program." *Id.* at 280 (citations omitted). The Medical School "conceded its inability to carry that burden" and the California Supreme Court "amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School." *Id.* at 280–81 (citations omitted).

²⁴ *Id.* at 281.

its purpose or the safeguarding of its interest.”²⁵ The Court evaluated each of the purported purposes of the special admissions program—

(i) ‘reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession,’ (ii) countering the effects of societal discrimination, (iii) increasing the number of physicians who will practice in communities currently underserved, and (iv) obtaining the benefits that flow from an ethnically diverse student body

—under the strict scrutiny test.²⁶ The Court found that the Medical School advanced one purpose of the special admissions program that warranted further review—attaining a diverse student body.²⁷ The Court held that the Medical School’s “argument that [its quota system] is the only effective means of serving the interest of diversity is seriously flawed.”²⁸ In other words, the Medical School’s quota system was not the least restrictive means available to promote diversity at the school.

Despite the Court’s position against the affirmative action program at the Medical School, the door for race-based affirmative action in higher education admissions remained open after *Bakke*, and it remains open today.²⁹ Nevertheless,

²⁵ *Id.* at 305 (quoting *In re Griffiths*, 413 U.S. 717, 721–22 (1973) (footnotes omitted); *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 196 (1964)).

²⁶ *Bakke*, 438 U.S. at 305–06.

²⁷ *Id.* at 311. The Court stated: “This clearly is a constitutionally permissible goal an institution of higher education.” *Id.* at 311–12. The Court went on to say, however, “the question remains whether the program’s racial classification is necessary to promote this interest.” *Id.* at 314–15.

²⁸ *Id.* at 315.

²⁹ *Id.* at 265. The institution has a compelling interest in reducing past effects of racial discrimination if it presents “judicial, legislative, or administrative findings of constitutional or statutory violations.” *Id.* at 307. “It may be assumed that in some situations a State’s interest in

the most important language of the *Bakke* opinion is the Court's warnings against the use of special admissions programs based on suspect classifications.³⁰ An institution that considers the use of a race-based affirmative action scheme should, after a true evaluation of the Court's warnings, logically conclude that employing such a scheme lacks prudence. Using the *Bakke* framework, however, institutions still attempt to try their hand at employing successful race-based affirmative action programs. Two attempts by the University of Michigan undergraduate and law school, respectively, are outlined below.

C. *Gratz v. Bollinger*

Jennifer Gratz applied for admission to the College of Literature, Science, and the Arts at the University of Michigan (hereinafter "University") in 1995.³¹ The University delayed her application and ultimately denied her admission.³² As a member of a class action lawsuit against the University, Gratz claimed that the University treated members of certain "racial or ethnic groups, including Caucasian . . . less favorably on the basis of race in considering their application for admission."³³ The University's admissions guidelines, including its use of racial

facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification." *Id.* at 310. "[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education." *Id.* at 311–12.

³⁰ See *id.* at 298 (acknowledging that the following "are serious problems of justice connected with the idea of preference itself[.]" (1) "Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the groups general interest[.]" (2) "preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth[; and] (3) there is a measure of inequity in forcing innocent persons in [Bakke's] position to bear the burdens of redressing grievances not of their making.") (citations omitted).

³¹ *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

³² *Id.*

³³ *Id.* at 253. The certified class consisted of applicants with this status "for all academic years from 1995 forward." *Id.* at 252–53.

preferences, evolved over the period relevant to the class litigation.³⁴

In 1995, the University considered race among other factors in making admissions decisions.³⁵ The University considered African Americans, Hispanics, and Native Americans as underrepresented minorities, and it did not deny that it “admits virtually every qualified . . . applicant from these groups.”³⁶ In 1997, the University modified its admissions procedure, allowing applicants to receive “points for underrepresented minority status, socioeconomic disadvantage, or attendance in at a high school with a predominately underrepresented minority population, or underrepresentation in the unit to which the student was applying (for example, men who sought to pursue a career in nursing).”³⁷

In 1998, the University once again altered its admissions procedure in favor of a “selection index, on which an applicant could score a maximum of 150 points.”³⁸ Each applicant received points based on certain factors, including “high school grade point average, standardized test scores, academic quality of applicant’s high school, strength or weakness of high school curriculum, in-state residency, alumni relationship, personal essay, and personal achievement or leadership.”³⁹ In addition, “under a ‘miscellaneous’ category, an applicant was entitled to 20 points based upon his or her membership in an underrepresented racial or ethnic minority group.”⁴⁰ The University used the selection index during the 1999 and 2000 academic years, and “every applicant from an underrepresented racial or ethnic group was awarded 20 points.”⁴¹

³⁴ See *id.* at 253–57 (analyzing the University admissions guidelines from 1995 through 2000).

³⁵ *Id.* at 254.

³⁶ *Id.*

³⁷ *Gratz*, 539 U.S. at 255.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 256.

Applying strict scrutiny and the *Bakke* framework, the District Court concluded that “a racially and ethnically diverse student body . . . constitutes a compelling governmental interest.”⁴² The District Court determined that the selection index “is a narrowly tailored means of achieving the University’s interest in the educational benefits that flow from a racially and ethnically diverse student body.”⁴³ In addition, the District Court held that “[t]he award of 20 points for membership in an underrepresented minority group . . . was not the functional equivalent of a quota because minority candidates were not insulated from review by virtue of those points.”⁴⁴

The class action members appealed the District Court’s judgment, and the Sixth Circuit Court of Appeals heard the appeal *en banc* on the same day as the appeal of *Grutter v. Bollinger*.⁴⁵ The Sixth Circuit released an opinion in *Grutter*, but not in *Gratz*.⁴⁶ The class litigants in *Gratz* asked the Supreme Court to grant certiorari to review the constitutionality of race-based admission standards, despite the fact that the Court of Appeals had not entered judgment in the case.⁴⁷ The Supreme Court granted the petition for certiorari.⁴⁸

Using strict scrutiny, the Supreme Court evaluated the special admissions program employed by the University.⁴⁹ *Gratz* and the other class litigants argued that “diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means.”⁵⁰ The Court rejected these arguments, and the class members “alternatively argue[d] that even if the University’s interest in

⁴² *Id.* at 258 (citing *Gratz v. Bollinger*, 122 F. Supp. 2d 811, 822–24 (E.D. Mich. 2000)).

⁴³ *Gratz*, 539 U.S. at 258 (citing *Gratz*, 122 F. Supp. 2d at 827).

⁴⁴ *Id.* (citing *Gratz*, 122 F. Supp. 2d at 828).

⁴⁵ *Id.* at 259.

⁴⁶ *Id.* at 259–60.

⁴⁷ *Id.*

⁴⁸ *Id.* at 249.

⁴⁹ *Gratz*, 539 U.S. at 270.

⁵⁰ *Id.* at 268.

diversity can constitute a compelling state interest, the District Court erroneously concluded that the University's use of race in its current freshman admissions policy is narrowly tailored to achieve such an interest."⁵¹ The Court agreed that "the University's policy, which automatically distributes 20 points, or one-fifth of the points needed to guarantee admission, to every single 'underrepresented minority' applicant solely because of race, is not narrowly tailored to achieve the interest in educational diversity that respondents claim justifies their program."⁵²

The majority opinion of the Supreme Court makes it obvious that the University did not adequately understand or apply the *Bakke* opinion from twenty-five years earlier. The concurring opinions, however, present a more critical assessment of the University's policy, and perhaps a more accurate assessment of race-based affirmative action programs, in general.⁵³ As Justice O'Connor wrote, the University's "mechanized selection index score, by and large, automatically determines the admissions decision for each applicant," and it does not "provide for a *meaningful individualized* review of applicants."⁵⁴ Likewise, and perhaps holding the most anti-affirmative action view of the Court, Justice Thomas wrote that he "would hold that a State's use of racial discrimination in higher education admissions is categorically prohibited by the *Equal Protection Clause*."⁵⁵

D. Grutter v. Bollinger

The Supreme Court decided *Grutter v. Bollinger*, involving the racial preference scheme employed by the University of Michigan Law School (hereinafter "Law School"), on the same day as *Gratz*. The Law School's admissions policy required consideration of criteria beyond an applicant's grades and test scores.⁵⁶ The Law School

⁵¹ *Id.* at 269.

⁵² *Id.* at 270.

⁵³ *See id.* at 276–81 (O'Connor, J., concurring).

⁵⁴ *Id.* at 276–77 (O'Connor, J., concurring) (emphasis added).

⁵⁵ *Gratz*, 539 U.S. at 281 (Thomas, J., concurring).

⁵⁶ *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003).

admitted that “[t]he policy aspires to achieve that diversity which has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts,” and that “[t]he policy does not restrict the types of diversity contributions eligible for substantial weight in the admissions process.”⁵⁷ The Law School admitted, however, that the admissions policy reaffirmed a longstanding commitment to racial and ethnic diversity.⁵⁸ Specifically, the Law School intended to lend special preference to African Americans, Native Americans, and Hispanics.⁵⁹

The Law School referred to the effect of its admissions policy as the enrollment of a “critical mass” of underrepresented minority students.⁶⁰ The Law School argued that by enrolling this critical mass, it sought to ensure that those admitted under the affirmative action policy made “unique contributions to the character of the Law School.”⁶¹ The Law School defended its policy of considering an applicant’s race among other factors while not admitting a certain percentage or number of minority students.⁶² The dean of the Law School testified, however, that for some applicants race may play no role, while it may be the determinative factor for other applicants.⁶³

Barbara Grutter, a white Michigan resident, applied to the Law School in 1996.⁶⁴ The Law School initially placed Grutter on a waiting list, and subsequently rejected her application.⁶⁵ Joined by others similarly situated, Grutter filed suit against the Law School and alleged that the Law School rejected her application because of her race. She alleged that the Law School used race as a predominant factor, giving applicants who belong to certain minority groups “a significantly greater chance of admission than students with

⁵⁷ *Id.* at 315–16.

⁵⁸ *Id.* at 316.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Grutter*, 539 U.S. at 318.

⁶³ *Id.* at 319.

⁶⁴ *Id.* at 316.

⁶⁵ *Id.*

similar credentials from disfavored racial groups.”⁶⁶ The District Court concluded that the Law School’s use of race as a factor in admissions decisions was unlawful, but the Court of Appeals disagreed.⁶⁷ The Supreme Court “granted certiorari to resolve the disagreement among the Courts of Appeals on a question of national importance: Whether diversity is a compelling interest that can justify the narrowly tailored use of race in selecting applicants for admission to public universities.”⁶⁸

The Supreme Court held that “the Law School has a compelling interest in attaining a diverse student body.”⁶⁹ The Court also stated that the Law School properly used its affirmative action policy to attain a diverse student body, and that the presumption of good faith exists, unless there is a showing to the contrary.⁷⁰ Further, the Supreme Court held that the Law School’s admissions policy was narrowly tailored because it only considered race as a “plus” factor, and that the Law School “engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment.”⁷¹

Regardless of the nuances of its operation, compared to other invalidated race-based affirmative action schemes, this admissions policy survived because the Law School presented it as a less threatening scheme than those found in *Bakke* or *Gratz*. As Chief Justice Rehnquist notes in his dissent, however, “[s]tripped of its ‘critical mass’ veil, the Law School’s program is revealed as a naked effort to achieve racial balancing.”⁷² The Chief Justice and the other dissenting Justices pointed out the primary weakness of the “critical mass” argument—theoretically, it should produce an equal number of each minority group, but it actually favors

⁶⁶ *Id.* at 317.

⁶⁷ *Id.* at 321.

⁶⁸ *Grutter*, 539 U.S. at 322.

⁶⁹ *Id.* at 328.

⁷⁰ *Id.* at 329 (quoting *Bakke*, 438 U.S. at 318–19).

⁷¹ *Id.* at 333–41.

⁷² *Id.* at 379 (Rehnquist, C.J., dissenting). Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist in this part of his dissent.

African Americans.⁷³ After much discussion, the dissenters determined that the Law School not only failed to “explain the phenomenon,” but it “attempt[ed] to obscure it.”⁷⁴ This type of obscurity clouds the merit of any race-based affirmative action scheme in higher education admissions.

IV. APPEALING THEORIES TO PROPONENTS OF RACE-BASED AFFIRMATIVE ACTION

Proponents of race-based affirmative action have several legal, philosophical, and jurisprudential theories to rely upon in support of continuing the practice of giving preference to certain minority racial groups. Often, the theories are presented in broad terms, without specific mention of race-based affirmative action.⁷⁵ It is possible (perhaps desired), however, to evaluate the principles of race-based affirmative action by using a particular theory, and affirming the merit of the practice by doing so. This section will discuss two theories that proponents may use in support of race-based affirmative action, as well as present this author’s critique of each theory, with respect to race-based affirmative action.

A. John Rawls’s Original Position

John Rawls refined the notion of the “original position” as a means by which members of a society will agree upon

⁷³ *Id.* at 380–85 (Rehnquist, C.J., dissenting). The Chief Justice presents the admissions disparities among each minority group and then states that the Law School offers “no race-specific reasons for such disparities. Instead they simply emphasize the importance of achieving ‘critical mass,’ without any explanation of why that concept is applied among the three underrepresented minority groups” *Id.* at 381 (Rehnquist, C.J., dissenting). The Chief Justice concludes that the different numbers “come only as a result of substantially different treatment among the three underrepresented minority groups” *Id.* at 382 (Rehnquist, C.J., dissenting).

⁷⁴ *Grutter*, 539 U.S. at 385 (Rehnquist, C.J., dissenting).

⁷⁵ Rawls’s “original position” does not refer to affirmative action specifically. Critical Race Theory (CRT) is a general jurisprudential school that directly addresses affirmative action, but not all CRT theorists support the current form of affirmative action.

the principles that will govern the society.⁷⁶ Members of society must agree upon these principles without knowledge of the “qualities, attributes, privileges, and abilities each person might hold.”⁷⁷ In other words, members of society, while beneath a “veil of ignorance,” must decide the principles that will ultimately govern the society.⁷⁸ Rawls contends that the original position sets up a fair procedure for society to agree upon just principles.⁷⁹ He views this result as “justice as fairness,” not necessarily because justice and fairness are equivalents of each other, but because the method of achieving justice—through the original position—is a fair method.⁸⁰

Obviously, Rawls’s formulation assumes that there are *right answers*; the actors in the original position will decide upon certain basic principles, regardless of the time, location, or frequency of the assessment. According to Rawls, the actors in the original position would agree upon the following principles of justice:

[First,] each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. [Second,] social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and

⁷⁶ See ROBERT PAUL WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE (Princeton Univ. Press 1977) (outlining the evolution of Rawls’s “original position” theory). Rawls had discussed the “original position” and similar theories in previous works, JUSTICE AS FAIRNESS and DISTRIBUTIVE JUSTICE and made adjustments before reaching the final version presented in *A THEORY OF JUSTICE*. See *id.*

⁷⁷ Chris Chambers Goodman, *Beneath the Veil: Corollaries on Diversity and Critical Mass Scholarships from Rawls’ Original Position on Justice*, 13 WASH. & LEE J. CIV. RTS. & SOC. JUST. 285, 287 (2007).

⁷⁸ RAWLS, *supra* note 2, at 136–37.

⁷⁹ *Id.* at 136.

⁸⁰ *Id.* at 12–13.

positions open to all under conditions of fair equality of opportunity.⁸¹

The general conception of Rawls's theory more adequately summarizes the principles that will result from the original position framework: "All social primary goods—liberty and opportunity, income and wealth, and the bases of self-respect—are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favored."⁸²

Even using only this brief summation of Rawls's theory, the weaknesses of the theory, in general, and in relation to its appeal to proponents of race-based affirmative action can be exposed. First, Rawls's hypothesis may well be *too* hypothetical to a point that it is of little or no use. Second, the original position actors' minimal knowledge is sufficient for the formulation of biased positions. Third, even if the original position actors decide upon the two basic principles identified by Rawls, race-based affirmative action is not consistent with those principles.

Rawls admits that the original position "is not . . . thought of as an actual historical state of affairs, much less as a primitive condition of culture."⁸³ Instead, he suggests that we may understand the original position "as a purely hypothetical situation characterized so as to lead to a certain conception of justice."⁸⁴ A hypothesis allows for the assumption of certain facts as truth for the sake of argument. In addition, the potential outcomes of a complex theory, such as Rawls's theory of justice, may be evaluated using a hypothetical framework. Rawls's original position, however, not only allows for assumption of certain facts, but it limits the assessment of those assumptions beneath the veil of ignorance. Thus, the framework is *too* hypothetical because it is narrowed to the point of no actual negotiation among the actors, the actors cannot act behind such a veil of ignorance,

⁸¹ *Id.* at 302.

⁸² *Id.* at 303.

⁸³ *Id.* at 12.

⁸⁴ RAWLS, *supra* note 2, at 12.

and it does not allow for changed circumstances in the society.

Second, despite the veil of ignorance, the actors in the original position “know the general facts about human society.”⁸⁵ This means that the original position actors “understand the political affairs and the principles of economic theory; they know the basis of social organization and the laws of human psychology.”⁸⁶ It seems logical that, even with only this minimal knowledge, the actors in the original position can deduce certain other knowledge that would permit them to form biases and other self-interested positions within the negotiations. Thus, “[t]he parties could not in principle possess all and only the knowledge Rawls imputes to them[,]” and furthermore, “the impossibility is logical, not merely genetic.”⁸⁷

Finally, even assuming that Rawls’s theory is logical and useful, the use of race-based affirmative action does not correlate with the theory. Proponents of race-based affirmative action in higher education would argue that the practice conforms to the principles of justice prescribed by Rawls because it distributes scarce educational resources to those most in need of them—members of minority groups who are traditionally disadvantaged because of their race. The assumption, however, that only members of minority groups face disadvantages, does not hold. Thus, the theory could only correlate to distribution of scarce educational resources to *all* disadvantaged persons, not only those of particular racial groups.

B. Critical Race Theory

Critical Race Theory is a “positivist body of scholarship, primarily created by people of color, aimed at breaking down

⁸⁵ *Id.* at 137.

⁸⁶ *Id.*

⁸⁷ ROBERT PAUL WOLFF, UNDERSTANDING RAWLS: A RECONSTRUCTION AND CRITIQUE OF A THEORY OF JUSTICE 72 (Princeton Univ. Press 1977).

the barriers of racism ‘institutionalized in and by law.’”⁸⁸ Critical Race Theory has several basic themes or features, and the most common is that racism is endemic in America. In other words, members of the Critical Race Theory movement see racism as a normal feature of our society. In addition, Critical Race Theory attempts to attack and mischaracterize liberal ideals, such as those presented by John Rawls and Ronald Dworkin.⁸⁹ In doing so, subscribers of Critical Race Theory conflict with the notion of liberals, that “the battle against racism should be fought on all fronts, including legal reform, and that we should do our best to eliminate discrimination in as many contexts as possible . . . and enact affirmative action schemes in the hope that they withstand constitutional muster.”⁹⁰

Despite the fact that Critical Race Theory presents a more extreme view of racism and discrimination than traditional liberalism and the Critical Legal Studies movement, not all members of the Critical Race Theory movement support affirmative action as the solution to racism.⁹¹ This should come as no surprise because the major tenet of Critical Race Theory does not correspond to the purported goals of affirmative action. In fact, race-based affirmative action purports to remedy discrimination and promote diversity. Critical Race Theorists, however, have become complacent

⁸⁸ Justin P. Walsh, *Swept Under the Rug: Integrating Critical Race Theory into the Legal Debate on the use of Race*, 6 SEATTLE J. FOR SOC. JUST. 673, 674 (2008) (quoting Derrick A. Bell, *Who’s Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899 (1995)).

⁸⁹ See Douglas E. Litowitz, *Some Critical Thoughts on Critical Race Theory*, 72 NOTRE DAME L. REV. 503, 512–16 (1997) (explaining the need to focus the Critical Race Theory critique of liberalism).

⁹⁰ *Id.* at 514.

⁹¹ See Daniel A. Farber, *The Outmoded Debate Over Affirmative Action*, 82 CALIF. L. REV. 893, 905 (1994); Richard Delgado, *Affirmative Action as a Majoritarian Device: Do You Really Want to be a Role Model?*, 89 MICH. L. REV. 1222, 1226 (1991) (advising minorities to “demystify, interrogate, and destabilize affirmative action” as a scheme “designed by others to promote their purposes, not ours”). Cf. Robin D. Barnes, *Politics and Passion: Theoretically a Dangerous Liaison*, 101 YALE L.J. 1631, 1647 (1992) (showing how affirmative action provides for reparation, economic efficiency, and “improved opportunities for integration and diversity”).

with the presence of racism in our society. Therefore, Critical Race Theorists should not support race-based affirmative action because of the inconsistent goals of race-based affirmative action and Critical Race Theory.

With the stated goals of affirmative action in conflict with the extreme position of Critical Race Theory, the argument in support of affirmative action becomes circular. If affirmative action reaches its goals of remedying past discrimination and promoting diversity, then it is no longer needed. At that point in time, assessments (such as higher education admissions) would be made without the effects of preferences from affirmative action schemes. If those preference-free assessments could not provide racial balancing, then the need for affirmative action would rise again, and some minority group (or groups) would receive the benefits of the preferences given by race-based affirmative action.

The need for affirmative action will arise because diversity has been lost, again creating at least one “majority” group and at least one “minority” group. The minority group would once begin to receive the benefits of the preferences given by affirmative action. The post-diversity minority and majority groups are not necessarily the same as the pre-diversity minority and majority groups. This shows that race-based affirmative action can only exist in an environment of non-diversity, contrary to at least one of its stated goals. Thus, while Critical Race Theory supports the advancement of members of minority racial groups, it does little to advance the cause of race-based affirmative action.

V. ALTERNATIVES TO AFFIRMATIVE ACTION AS A MEANS TO AN END IN HIGHER EDUCATION

A. Revisiting the Law School Admissions Director

With much reservation and urging from the dean of the Law School and president of the University, the admissions director chooses Applicant A and Applicant B as the final two members of the law school’s entering class. The mandated use of the law school’s affirmative action policy primarily influenced the admissions director’s choices. While

personally opposed to the affirmative action policy and the results that it produces, the admissions director relied upon the preceding cases and theories to make her decision.

Even though the admissions director understands the rationale presented by each case and theory in support of race-based affirmative action, she still has difficulty accepting the inequitable impact that it has on those involved in the application and selection process. The admissions director shares this logical position with many others. While cognizant of the negative effects of racial discrimination, she understands that race-based affirmative action promotes discrimination against members of two groups in particular—those with superior merit and those who are socio-economically disadvantaged. In the hypothetical, Applicant C and Applicant D occupy those positions, respectively.

This situation is often referred to as “reverse discrimination,” but it can simply be referred to as discrimination.⁹² Using a term such as reverse discrimination accepts the argument that the practice of discrimination is reserved for only certain people or groups, and that reverse discrimination is a different practice reserved for other people or groups. On the other hand, Consistent use of the term “discrimination” reinforces the argument that all individuals may suffer the same harms of discrimination, and that all individuals deserve the same protections of antidiscrimination laws.

B. The New Assignment: Finding a Better Means

Luckily, the Admissions Director has a chance to make a difference. She has been chosen as a member of a national task force—Coalition of Lawyers & Other Race-Based Legal Institutions Necessitating Diversity (COLOR BLIND). The task force must propose an alternative to race-based affirmative action that will eliminate the inequitable preferences given by race-based affirmative action schemes.

⁹² Rachel F. Moran, *What Counts as Knowledge? A Reflection on Race, Social Science, and the Law*, 44 *LAW & SOC’Y REV.* 515, 527–28 (2010).

The task force members must individually evaluate possible alternatives, and the task force will compile the recommendations of each member. The admissions director has evaluated many alternatives, and the most appealing alternatives are discussed below. The task force should adopt the two-fold approach because it is the most adequate and equitable alternative to race-based affirmative action.

1. Civil Disobedience as a Temporary Answer

Civil disobedience comes in various forms. For purposes of this paper, civil disobedience is defined as “a political protest over an unjust law or policy committed by violating law conscientiously, openly, and nonviolently, with respect for the interests of others and with acceptance of punishment.”⁹³ Societies have practiced civil disobedience in all periods of time, and its presence is arguably universal.

Civil disobedience was practiced in biblical times, perhaps most notably in the story of Shadrach, Meshach, and Abednego.⁹⁴ King Nebuchadnezzar created an idol and demanded the people under his rule to worship the idol, or face the consequence of being thrown into a burning furnace.⁹⁵ Willing to accept the king’s punishment because of their faithfulness to God, Shadrach, Meshach, and Abednego refused to worship the idol.⁹⁶ In other words, the three were disobedient to the commands of the king because they viewed his command as unjust, or in conflict with the law of God, and they were willing to accept the consequences of their disobedience.

Americans have practiced civil disobedience throughout the country’s history, and “[t]he sit-in, in its various forms, is the most common type of civil disobedience practiced in

⁹³ Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 *CARDOZO L. REV.* 2083, 2085–86 (2007).

⁹⁴ *Daniel* 3:1–30.

⁹⁵ *Id.* at 3:1–6.

⁹⁶ *Id.* at 3:12–18.

America today.”⁹⁷ Sit-ins are either a direct⁹⁸ or an indirect⁹⁹ form of civil disobedience. Arguably, civil rights activists in the 1960’s, protesting racial discrimination in public places such as buses, lunch counters, and restaurants, conducted the most prominent sit-ins in the United States.¹⁰⁰ While one may think of sit-ins as the most popular form of civil disobedience in the United States, civil disobedience can take many forms. For example, and most relevant to the current topic, civil disobedience has been advocated as a means of minimizing or eliminating the effects of discrimination through race-based affirmative action.¹⁰¹

In response to the Supreme Court’s decision in *Grutter v. Bollinger*,¹⁰² Dr. Martin Carcieri, a lawyer and professor of Political Science, wrote an article advocating the use of civil disobedience to offset the effects of race-based affirmative action.¹⁰³ In Carcieri’s opinion, professors such as himself “who grade and/or write reference letters for law school applicants each year are morally permitted to distort their assessments, based on race, in order to offset the racial discrimination practiced at institutions like [the University of Michigan Law School].”¹⁰⁴ Carcieri bases the moral permissibility of the proposed lawless act on four broad

⁹⁷ Bruce Ledewitz, *Perspectives on the Law of the American Sit-in*, 16 WHITTIER L. REV. 499, 502 (1995).

⁹⁸ *Id.* (defining direct civil disobedience as “the violation of a law that is itself deemed to be unjust in some sense”).

⁹⁹ *Id.* (defining indirect civil disobedience as “the violation of a law acceptable, or at least neutral, in itself in order to oppose some other policy”).

¹⁰⁰ See Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 986–88 (2005) (analyzing *Bell v. Maryland* and the dispute over whether arrests for sit-ins constituted state action, and were thus a violation of the Fourteenth Amendment).

¹⁰¹ Martin D. Carcieri, *Grutter v. Bollinger and Civil Disobedience*, 31 U. DAYTON L. REV. 345, 346–47 (2006) (suggesting civil disobedience by professors to offset discriminatory effects of race-based affirmative action programs).

¹⁰² See *Grutter*, 539 U.S. 306 (2003).

¹⁰³ See Carcieri, *supra* note 101.

¹⁰⁴ *Id.* at 347. Despite Carcieri’s advocacy of civil disobedience, he contends that he has “no plans to engage in such conduct.” *Id.*

inquiries: (1) the damage done to the interests of others; (2) the purpose of the disobedience; (3) the actors' willingness to accept punishment; and (4) the form of government under which the disobedience occurs.¹⁰⁵ Despite these inquiries into the moral permissibility of a lawless act, Carcieri's proposal to offset the discriminatory effects of affirmative action through civil disobedience is flawed.

While Carcieri's proposal may seem appealing at first glance, its major flaw is the inability to account for the unintended consequences that may flow from the civil disobedience. These unintended consequences arise when professors distort the assessments of students in order to mitigate the discriminatory effects of race-based affirmative action at a specific institution, but the student attempts to use her grades or reference letters at another institution which employs no such scheme, or the student attempts to use the distorted assessments for any other purpose. Carcieri partially admits the weakness of his proposal in this respect.¹⁰⁶ This illustrates the practical weakness of civil disobedience as an alternative to race-based affirmative action, and should eliminate consideration of it as an alternative.

2. Using Merit as the Ultimate Indicator

The central tenet underlying the use of merit in higher education admissions is that an institution admits (or denies) an applicant based on earned qualities. Supporters of merit view non-meritorious admissions programs, such as race-based affirmative action, as a means of giving an unearned

¹⁰⁵ *Id.* at 367–68 (citing KENT GREENAWALT, A CONTEXTUAL APPROACH TO DISOBEDIENCE, IN AM. SOC'Y. FOR POLITICAL AND LEG. PHIL., POLITICAL AND LEGAL OBLIGATION, 332, 350 (J. Roland Pennock & John W. Champman eds., Atherton Press 1970)).

¹⁰⁶ *Id.* at 377. Carcieri points out that “this objection is much weaker with respect to law school reference letters than with respect to grades” because “[s]uch letters will usually be relied upon only by law school admissions committees, all of which will be seeking minority students.” *Id.* He goes on to argue that those injured by the act of civil disobedience should seek relief from the institution which caused the disobedient actor to act, instead of seeking relief from the disobedient actor. *Id.*

advantage to undeserving applicants. On the contrary, most supporters of admissions preferences afforded by race-based affirmative action “contend that standards of merit are socially constructed to maintain the power of dominant groups.”¹⁰⁷ These opponents of solely merit-based assessments view admissions preferences as a necessary means of offsetting the primary effect of merit—maintaining white dominance.¹⁰⁸ This extreme view, held most prominently by the Critical Race Theorists, is an inapposite view of merit. There are, however, concerns with using merit as the ultimate indicator in higher education admissions.

The foremost flaw of merit is a definitional one. Depending upon the varying institutional goals, the definition of merit may also vary. If an institution has a goal of recruiting talented minds, then the institution would likely define merit based on an individual’s academic performance.¹⁰⁹ Likewise, if an institution has a goal of producing superior athletic teams, then the institution would likely define merit in athletic terms. Even if the institution had the primary institutional goal of promoting diversity, the institution may not necessarily use race as a determinative factor. The definitional problem faced with merit would also arise with respect to diversity. Thus, the institution must define the type of diversity it seeks to achieve, followed by the type of merit it will use to attain the desired diversity. Despite this definitional variance, it is highly unlikely that the definition of merit would translate into the use of race as a factor.

In addition to the definitional flaw, the use of merit as the ultimate indicator in higher education admissions also presents qualitative and quantitative limits. The qualitative limit advances the definitional flaw to an additional inquiry. Once an institution defines its goals, and ultimately reaches its definition of merit, then the qualitative limits of merit are

¹⁰⁷ Daniel A. Farber & Suzanna Sherry, *Is the Radical Critique of Merit Anti-Semitic?*, 83 CALIF. L. REV. 853, 856 (1995).

¹⁰⁸ *Id.* at 864.

¹⁰⁹ Laurence Thomas, *Equality and the Mantra of Diversity*, 72 U. CIN. L. REV. 931(2004).

realized. Therefore, while admissions standards may require purely academic assessments, they should also require assessments of non-academic, abstract qualities such as “skill-empathy, communication, perseverance, and cooperation.”¹¹⁰ Furthermore, the quantitative limits are then realized because merit requires the quantification of its features, and quantification of abstract qualities may be difficult or impossible.

Because of these flaws, institutions should be cautious when using merit as the ultimate indicator in higher education admissions, but the use of merit in higher education admissions should continue. The total absence of merit from admissions considerations allows for the arbitrary preference of students with inferior merit who fall into a suspect racial group, but face no economic disadvantages, over students with superior merit. This illustrates the inequity of race-based affirmative action programs on non-minority students with superior merit, relative to minority students who have inferior merit, but demonstrate no socio-economic disadvantage. Applicant C and Applicant A occupy these respective positions in the hypothetical.

Thus, institutions should use merit as *a* factor in higher education admissions, but not *the* factor. On the contrary, institutions should not arbitrarily consider race in the admissions process. The elimination of discrimination in higher education admissions, however, does not eliminate disadvantages across all racial lines. Therefore, a suitable alternative to race-based affirmative action needs to be formulated.

3. Achieving Adequacy and Equity: A Twofold Approach

America needs to take *affirmative action* toward equality as much today as at any time in her history. There exists, however, a greater need for equality and fairness in our

¹¹⁰ Toby Egan, *Critical Race Theory's Individual Flaw*, 67 UMKC L. REV. 661, 667 (1999) (citing Richard Delgado, *Rodrigo's Thirteenth Chronicle: Legal Formalism and Law's Discontents*, 95 MICH. L. REV. 1105, 1141 (1997)).

approach to affirmative action. We must renew our pledge to affirmative action. This renewed pledge must see no color, but it must seek justice and equality for the most disadvantaged individuals of society, regardless of their color. In addition, society must ensure that those who face the greatest disadvantages are shown compassion and preference long before they attempt to gain admission to an institution of higher education. Thus, the new approach to affirmative action must be disadvantage-based, and it must include an early intervention component.

Affirmative action in higher education admissions must be disadvantage-based as opposed to race-based. Race-based affirmative action programs attempt to operate under the guise of giving preference to traditionally disadvantaged groups. The Medical School certainly made this attempt in *Bakke*.¹¹¹ In moving forward, society should learn from such failed attempts. In doing so, society will find that the administration of affirmative action programs that assist applicants based on socio-economic disadvantage will address the “over-breadth of the coverage and definition of favored groups.”¹¹²

In addressing the over-breadth problem posed by race-based affirmative action, all higher education applicants will benefit. First, minority applicants who face no socio-economic disadvantage will benefit because they will ultimately gain admission to an institution more suitable to their own needs and abilities. The preference given by race-based affirmative action programs often forces those applicants into an institution that will subject them to failure. In the hypothetical, Applicant A and Applicant B are, perhaps, forced into this failure.

Second, non-minority applicants who face socio-economic disadvantages will benefit because they will now have an opportunity to compete on a playing field otherwise tilted in favor of the most advantaged members of society.

¹¹¹ *Bakke*, *supra* note 1, at 281 n.14 (acknowledging the University’s special admissions program aimed to increase minority enrollment).

¹¹² Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL’Y REV. 1, 78 (2002).

These applicants are doubly-disadvantaged under race-based affirmative action programs—they face socio-economic disadvantages, as well as racial discrimination perpetrated by the race-based affirmative action programs. In the hypothetical, Applicant D faces this double-disadvantage.

Third, minority students who face socio-economic disadvantage will perhaps benefit most from disadvantage-based affirmative action because they are most harmed by the over-breadth of race-based affirmative action. With race-based affirmative action, an institution may prefer a minority applicant with no socio-economic disadvantage over a disadvantaged minority applicant with the same or superior credentials. Race-based affirmative action schemes allow this because the scheme can justify the action, regardless of whether society views the action as justified.

In addition to transforming race-based affirmative action into disadvantage-based affirmative action, we must develop early intervention strategies to address the problems faced by the disadvantaged who may ultimately receive affirmative action preference. This approach has been termed the “root cause strategy”.¹¹³ As Peter Schuck writes, such a strategy “emphasize[s] the desperate need to improve the schools that low-income children attend, provide remedial assistance to those who cannot progress without it, expand job training for low-skill workers who cannot otherwise compete in the labor market, and help minority entrepreneurs build stable, competitive businesses.”¹¹⁴

Despite its appeal, society must approach an alternative such as the “root cause strategy” with caution. Particularly, any early intervention program implemented must itself be disadvantage-based and racially neutral. There is no need to implement such programs, if they will only maintain the status quo. Some critics are pessimistic toward such

¹¹³ *Id.* at 82.

¹¹⁴ *Id.* at 82–83 (citing Paul M. Barrett, *Birmingham’s Plan to Help Black-Owned Firms May Be Alternative to Racial Set-Aside Programs*, WALL ST. J., Feb. 27, 1995, at A14; NICHOLAS LEMANN, *THE BIG TEST* 345, 348–49 (1999); Jed Rubenfeld, *Affirmative Action*, 107 YALE L.J. 427, 471 (1997)).

strategies.¹¹⁵ If the energy of these critics and the supporters of race-based affirmative action would join forces in achieving equity in higher education admissions, then they could implement an effective early intervention program with ease. Without coupling early intervention and disadvantage-based affirmative action, however, we will simply continue to provide interim treatment to a disease that deserves a cure.

VI. CONCLUSION

The debate about race-based affirmative action has raged since President Kennedy used the words in Executive Order 10,925 in 1961.¹¹⁶ Frederick Douglass, however, made a wiser and more prudential statement to a group of abolitionists in 1865. Those who find themselves in the race-based affirmative action debate must consider Douglass's statement, quoted by Justice Clarence Thomas in his dissent in *Grutter v. Bollinger*:

In regard to the colored people, there is always more that is benevolent, I perceive, than just, manifested towards us. What I ask for the negro is not benevolence, not pity, not sympathy, but simply *justice*. The American people have always been anxious to know what they shall do with us.... I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us. Do nothing with us! If the apples will not remain on the tree of their own strength, if they are worm-eaten at the core, if they are early ripe and disposed to fall, let them fall! ... And if the negro cannot stand on his own legs, let him fall also. All I ask is, give him a chance to stand on his own

¹¹⁵ *See id.* at 83 (discussing the difficulty of the “root cause strategy” approach).

¹¹⁶ Exec. Order No. 10,925, *supra* note 7.

legs! Let him alone! ... Your interference is doing him positive injury.¹¹⁷

Justice Thomas continued his dissent by incorporating Douglass's call for justice into the higher education affirmative action framework before the Court in *Grutter*. As Justice Thomas pointed out, "[n]o one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admission standard and grant exemptions to favored races."¹¹⁸

As a society, the focus must shift to those who face real disadvantages, regardless of the color of their skin. Furthermore, our actions must be proactive and preventative, rather than reactive and preferential. If, instead, we continue to use race-based affirmative action programs that run afoul of traditional notions of fairness and justice, then we are simply forcing square pegs into round holes.

¹¹⁷ *Grutter*, 539 U.S. at 349–50 (Thomas, J., dissenting) (quoting Frederick Douglass, *What the Black Man Wants: An Address Delivered in Boston, Massachusetts (January 26, 1865)*, reprinted in 4 *THE FREDERICK DOUGLASS PAPERS* 59, 68 (J. Blassingame & J. McKivigan eds. 1991)). This speech was delivered with the abolition of slavery (of Negroes) at the forefront of American history. In today's context however, this call for justice should apply to any race, specifically those given preference in cases such as *Grutter*. Justice Thomas points out, however, that the "message [is] lost on today's majority[.]" *Grutter*, 539 U.S. at 349 (Thomas, J., dissenting).

¹¹⁸ *Id.* at 350 (Thomas, J., dissenting).