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Contesting an Illusion of Equity: A Textual Analysis of “Friend of the Court” Briefs in the University of Michigan’s Affirmative Action Cases

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## Introduction: Upholding *Bakke*<sup>1</sup>

On June 23, 2003, for the first time since the *Regents of the University of California v. Bakke* (1978), the Supreme Court, in a 5-4 ruling, endorsed the use of race-conscious practices in the University of Michigan's law school case—*Grutter v. Bollinger* (2003). The Court's decision was monumental. The Court's majority in *Grutter* not only upheld the use of race in university admissions, the Justices also recognized Justice Lewis Powell's diversity rationale, putting an end to speculations that his opinion in *Bakke* represented a sole dissenting voice.<sup>2</sup> Affirming Justice Powell's diversity rationale, the Court declared that "student body diversity is a compelling state interest that can justify the use of race in university admissions" (*Grutter*, 2003, p. 9). Colleges and universities, however, must be cautious about the means by which they work to attain diversity. While the Court upheld the Law School's admissions procedures, they struck down their undergraduate admissions practices in *Gratz v. Bollinger* (2003), contending that Michigan's undergraduate policies were too mechanistic, relying too heavily on point indices to determine eligibility. The Court preferred the Law School's holistic admissions program, which provided students with an individualized admissions review. It was this program that the Court believed satisfied the criterion of narrowly tailored, or reasonably necessary, race-conscious admissions practices.

The Supreme Court's most recent support of affirmative action has not quelled the controversy surrounding its implementation. Critics have long fueled the fire by casting race-conscious affirmative action<sup>3</sup> as inherently flawed, immoral, and undemocratic. They condemn the policy, suggesting that advocates of student body diversity should embrace race-neutral alternatives, such as class-based affirmative action, which targets students from low socio-economic backgrounds, or percentage plans, used by some state universities to guarantee admission to the top few percent of their state's graduating seniors.<sup>4</sup> Misappropriating the language of civil rights heroes, critics of race-conscious policies also suggest that affirmative action practices run contrary to the notion of racial justice. For example, in its brief opposing race-conscious admissions practices, The Center for Individual Freedom proclaims:

Dr. Martin Luther King, Jr. famously dreamed that his children would one day live in a nation where they would 'not be judged by the color of their skin but by the content of their character.' Apparently unmoved by Dr. King's words, the University of Michigan turns that dream on its head by judging its students precisely by the color of their skins and, in doing so, defiles the broader constitutional dream of equal protection of the laws (p. 2).

These tactics not only confuse the public discourse concerning equity in higher education, they also ignore the very reasons why race-conscious programs remain necessary.

Quoting selectively from the work of civil rights heroes cannot conceal the fact that in an increasingly credentialed work force, most Students of Color<sup>5</sup> remain shut out of enrollment opportunities at four-year colleges and universities (Allen & Solórzano, 2001; Valencia, 2002). Legacies of racial oppression and segregation, in addition to overcrowded and under-resourced schools, poorly qualified teachers, and ever-rising college admissions standards continue to make university admittance a dream deferred for too many Students of Color (Oakes, 1985; Oakes, 1990; Oakes & Guiton, 1995; Orfield & Eaton, 1996). Despite these facts, the Supreme Court has long disregarded the validity of remedial arguments that suggest that race-conscious affirmative action policies help make up for historic legacies of racist mistreatment and discrimination.<sup>6</sup> Having abandoned compensatory arguments as a legitimate defense of race-conscious policies, proponents of affirmative action have had to scramble to provide evidence of the policy's efficacy and worthiness, the result of which has led to revisiting Justice Powell's original *diversity rationale*. Now, proponents of race-conscious policies exalt the virtues of affirmative action in higher education not because they serve to equalize the academic playing field, but because student body diversity— a byproduct of race-conscious affirmative action policies—often helps encourage cross-racial contact and interaction, and thus helps promote pedagogical benefits and learning (Bowen & Bok, 1998; Gurin, Dey, Gurin, & Hurtado, 2004; Milem, 2004).

However, in the face of the well-funded and well-coordinated attack against affirmative action, as witnessed by the University of Michigan cases, race-conscious policies came dangerously close to going the way of the dinosaur. Why was it that we came so close to losing race-conscious affirmative action in higher education? In order to address this question, I analyze the body of court documents submitted in the Michigan law school case, *Grutter v. Bollinger*, and the Michigan undergraduate case, *Gratz v. Bollinger*. Included among these documents are the opening briefs in each case, the *amicus curiae*<sup>7</sup> or “friend of the court” briefs submitted in support of each party, and finally the Supreme Court's rulings.

The *amicus* briefs provide a revealing account of how race-conscious social justice policies have slowly been eroded from national memory, and replaced by a normative *language of preference* which relies on buzzwords such as “quota,” “set-aside,” and “special treatment” to redefine the notions of equity and access in higher education. In the current debate about affirmative action, the argument is not whether there is still racial injustice and discrimination which prevents traditionally under-represented students from preparing to meet the rigid

admissions standards set forth by the nations' leading universities. Instead, it focuses on whether these students merit admission over other qualified White applicants.

In order to explore this topic, this paper is divided into six major sections. First, I present the methodological-analytical lens that helped guide my work, followed by a brief retrospective of affirmative action. I also include an analysis of the *language of preference* which is important in the briefs, and of some of its central terms: "meritocracy," "colorblindness," and "equal opportunity." Finally, the paper closes with a discussion section.

### **Methodological-Analytical Lens**

This study relies principally on the *amicus* briefs filed in the University of Michigan's *Grutter* and *Gratz* cases. Utilizing a textual analysis framework, I examine how opponents of Michigan's race-conscious admissions practices rely on a *language of preference* to reject affirmative action policies and recast dominant ideologies of merit and opportunity. I utilize a textual analysis framework because it recognizes the critical role of language in the social world. As Lemke (1995) posits:

When we think of power in the social world, we imagine the power to do things: the power to buy and sell, to command obedience, to reward and punish, to give or take, to do good to others or do them harm, physically or emotionally. In all of these, language can and often does play a critical role. We know that we do not need 'sticks and stones' to hurt others; words can cause pain that cuts just as deeply. The language we speak to ourselves decides whom we will help or hurt, and why. The language we speak to others can enlist their aid or provoke enmity. The language others speak to us, from childhood, shapes the attitudes and beliefs that ground how we use all our powers of action (p.1).

Language is a powerful weapon, even in the most benign circumstances. In the case of a controversial topic, such as affirmative action, understanding how language is *operationalized* is necessary to understand policy. Therefore, rather than undertaking a legal analysis, my interest is in exploring the rhetorical construction of the arguments in the *amicus* briefs, with special attention paid to the anti-affirmative action briefs. More specifically, I am interested in examining how the images, metaphors, and rhetoric utilized by opponents of race-conscious policies penetrate popular discourses and contribute to common misperceptions of affirmative action as nothing more than quota-based race-preferences.

In order to begin to challenge the popular discourse used by critics of affirmative action, I utilize a Critical Race Theory (CRT) framework. Rooted in

jurisprudence, CRT originates from the work of progressive legal Scholars of Color who attempt to account for the role of racism in American law. CRT scholars work towards the elimination of racism and all forms of subordination in society (Matsuda, 1991). Therefore, CRT provides a helpful framework for this paper because CRT recognizes that race and racism are central to law and policy in the United States (Delgado & Stefancic, 2001). A CRT framework also helps explain how arguments in *Grutter* and *Gratz*, couched within principles of meritocracy and color-blindness, also carry racial and political undertones. More specifically, a CRT lens enables one to understand that although meritocracy is presumed to be an objective measure of talent in university admissions, meritocracy continues to function as a normative concept that has historically privileged Whites (Collins, 1998; Edley, 1996; Guinier & Strum, 2001; Omi & Winant, 1994; Young, 1990).

In addition, I borrow from the work of Solórzano and Delgado Bernal (2001), who revisit CRT's major tenets with a focus on education. Solórzano and Delgado Bernal posit five major themes "that form the basic perspectives, research methods, and pedagogy of a critical race theory in education" (p. 7). For the purposes of this paper I focus on three of these five themes, including:

1. *The Centrality of Race and Racism and Intersectionality with Other Forms of Subordination*: The concept of intersectionality recognizes that race and racism often work in tandem with other forms of oppression and marginalization, such as gender and class oppression (p. 7).
2. *The Challenge to Dominant Ideology*: "A critical race theory in education challenges the traditional claims of the educational system to objectivity, meritocracy, color-blindness, race neutrality, and equal opportunity." Citing Calmore (1992), Solórzano and Delgado Bernal also suggest that in the world of higher education, a CRT analysis recognizes that support of supposed meritocratic and colorblind admissions standards often conceals the "self-interest, power, and privilege of dominant groups in U.S. society" (p. 7).
3. *The Commitment to Social Justice*: Solórzano and Delgado Bernal propose that a commitment to social justice envisions the elimination of all forms of oppression and subordination, including: racism, sexism, classism, and homophobia (p. 7).

Guided by these tenets, I explore how the parties in *Grutter* and *Gratz* use race and racism to attack or defend race-conscious admissions policies. In addition, I inquire into whether colorblind admissions policies are truly blind to issues of race. Finally, a CRT lens enables me to question why it has taken opponents of affirmative action more than two decades to contest a policy they view as detrimental to all students, including Students of Color. Why is now the time to challenge the validity of race-conscious affirmative action? Informed by the work

of Harris (1995) and Collins (1998), I suggest that arguments in favor of race-neutral and colorblind admissions practices conceal greater interests, including the maintenance of White privilege and the status quo.

### **Discourses of Diversity**

In spite of the Supreme Court's rulings on the University of Michigan cases, uncertainty still lingers about the parameters of affirmative action policies and about who are its intended beneficiaries. Even the terminology surrounding discussions on affirmative action is complicated, and keeps people guessing about the distinctions between policies labeled as "racial preferences" or "race conscious." In this paper, as an effort to clarify some of the confusion that inevitably results from the complexity of a topic such as affirmative action, I point out that the term "racial preferences," as used by critics of affirmative action, is used to infer racial bias. Similar to the terms "quotas" and "set-asides," the term "racial preferences" is often used by critics of affirmative action to suggest that these policies are unlawful because of their supposedly blatant and illegal use of race in university admissions (Brief for the CATO Institute, 2003; Brief for The Center for the Advancement of Capitalism, 2003; Brief for the Center for Individual Freedom, 2003; Brief for the Reason Foundation, 2003). By contrast, the terms "colorblind" and "race-neutral" are used to indicate admissions policies in which race is less of a predominant factor. Finally, the terms "race-conscious" and "race-sensitive" as used by supporters of affirmative action recognize that race is an indelible part of the human experience, and thus must be considered in university admissions and beyond. As Lewis (2004) succinctly notes:

No matter how many times we click our heels and wish it were not so, race and history matter in the lives of all Americans. Maybe one day that will be less so. But at no time should we trade an honest exploration of our past for a Disney-like substitute. Tackling the history of race is the only way to build a diverse, plural democracy. And collectively that remains our shared responsibility (p. 59).

This paper, then, is an attempt to begin to tackle why race-conscious social policies continue to remain so controversial in a post-*Grutter* and *Gratz* world.

According to Witt and Shin (2003), affirmative action began as early as the mid-1800s with the passage of initiatives aimed at establishing equal opportunity for former slaves. More contemporary notions of affirmative action unfolded in the mid-to-late twentieth century with the passage of seminal federal legislation, in particular the Civil Rights Acts of 1957 and 1964.<sup>8</sup> In higher education, affirmative action attempts to recognize historic legacies of oppression

and discrimination, and to extend opportunities to *qualified* members of under-represented groups, including women, the poor, and Students of Color.

Undoubtedly much of the uncertainty about how to implement affirmative action can be traced back to its origins. Kane (1998) has observed, “Nearly two decades after the Supreme Court’s 1978 *Bakke* decision, we know little about the true extent of affirmative action admissions by race or ethnicity” (p. 17). While Kane attributes this phenomenon to colleges’ commitment to maintain their admissions practices guarded from political pundits, it is also possible that manipulation of the public discourse surrounding the affirmative action debate contributes to the confusion. Indeed, Stefancic and Delgado (1996) and Cokorinos (2003) suggest that on the cusp of the new century there is a well-funded, well-organized, and concerted effort by right wing politicians, foundations, and think tanks to dismantle race-based and gender-based social policy. A similar observation is made by Schmidt (2003) who notes that “colleges are not just up against a few rejected White applicants in the national debate over affirmative action on campuses. No, the forces aligned against them are much more formidable” (p. A22). What makes these organizations so formidable is that they have managed to polarize sentiments around affirmative action by casting race-conscious policies as “discriminatory,” “preferential,” and “quota-based” programs, which threaten individual citizenship rights guaranteed under the Constitution. In the post-Civil Rights era, when blatant forms of racism are less often tolerated, opponents of affirmative action argue that it is time to move beyond race. If all “men” [sic] are “created equal,” they propose that all men should be treated equally, absent race-conscious affirmative action policies.

As evidenced by the volume of *amicus curiae* briefs submitted on behalf of the University of Michigan’s *Grutter v. Bollinger* and *Gratz v. Bollinger* cases, affirmative action is likely to remain a controversial and volatile social policy. These cases pulled in a record number of *amicus* briefs; in the undergraduate case the respondent, the University of Michigan, received 45 friend of the court briefs, while the Law School received 69 briefs filed on their behalf.<sup>9</sup> Petitioners Jennifer Gratz and Barbara Grutter garnered 29 briefs of support. Although political pundits argued that these cases were likely to be decided on constitutional grounds alone, the importance of the briefs cannot be overstated. The briefs not only produce a public record on the state of diversity in contemporary U.S. higher education, they also present examples of the lingering disconnect between the popular ideology of equal opportunity on which this country was founded, and the reality of achieving that dream.

The briefs, both in favor of and in opposition to Michigan’s race-conscious admissions policies, are drawn from an impressive list of institutions, foundations, scholars, activists, politicians, Fortune 500 business leaders, high-ranking retired military personnel, and the Solicitor General of the United

States.<sup>10</sup> Solicitor General Theodore Olson's briefs (hereafter referred to as the U.S. Briefs), filed in opposition to both Michigan's undergraduate and law school admissions practices, provide a particularly interesting case.<sup>11</sup> The U.S. Briefs serve as prime examples of the complexity and confusion surrounding the affirmative action debate. The U.S. Briefs open with Solicitor General Olson querying:

Does the University of Michigan's use of *racial preferences* in undergraduate admissions violate the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) or 41 U.S.C. 1981? (p. i: emphasis added).

Calling for a prompt evaluation of Michigan's admissions practices, the U.S. Briefs adhere to the two mandates of "strict scrutiny" by suggesting that the University's race-conscious policies: (1) do not represent a compelling state interest, and (2) are not narrowly tailored, and therefore are not in compliance with constitutional law. Along with other arguments by affirmative action opponents, the U.S. Briefs suggest that admissions criteria utilized by the University of Michigan's undergraduate and Law School admissions programs are unconstitutional because each employs race-conscious admissions practices. More specifically, the U.S. Briefs charge that in the case of undergraduate admissions, the University operates an illegal, two-track admissions system through which "preferred minorities," or Students of Color, are given special treatment not afforded to White applicants. Similarly, in the Law School case the U.S. Briefs suggest that the School's aspiration to enroll a "critical mass" of Students of Color is nothing short of a thinly disguised "quota" program.

While Michigan's admissions programs were challenged by multiple organizations and agencies, the U.S. Briefs stand apart. These briefs are especially significant because through them the Bush Administration not only opposes race-conscious admissions practices, but also supports diversity in higher education. For instance, in *Grutter* the U.S. Briefs state:

Ensuring that public institutions, especially educational institutions, are open and accessible to a broad and diverse array of individuals, including individuals of *all* races and ethnicities, is an important and entirely legitimate government objective. Measures that ensure diversity, accessibility and opportunity are important components of government's responsibility to its citizens (p. 8: emphasis added).

Likewise, in support of *Gratz*, the U.S. Briefs argue that "the Court should hold that the University's race- and ethnic-based undergraduate admissions policies are unconstitutional because proven race-neutral alternatives to achieving



the *laudable* goals of educational openness and diversity remain available” (p. 13: emphasis added). As evidenced by these excerpts, the U.S. Briefs reflect the uncertainty surrounding the public discourse on race-conscious social policies such as affirmative action. Indeed, while on the one hand they condemn these policies on legal grounds, on the other hand the U.S. Briefs openly embrace diversity as a commendable goal. The latter point is intriguing since earlier in the U.S. Briefs it is argued that diversity is not a compelling state interest. In sum, these actions beg the question whether institutions of higher education can arrive at a diverse student body without race-conscious admissions programs. While critics of affirmative action call for race-neutral or colorblind alternatives to affirmative action policies, scholars (Karabel, 1998; Orfield, 2001) contend that class-based policies cannot maintain ethnic and racial diversity in higher education. And percentage plans, such as those used in Texas, operate within a system of highly segregated schools and districts to produce what can at best be called an illusion of equity. The modest success of a few Students of Color is used to exalt the virtues of “meritocracy” and “equal opportunity.” This ignores the fact that these students are the exception to the rule, and falsely promotes the illusion that student success in higher education hinges only on personal initiative and hard work.

### **A Language of Preference**

The use of a *language of preference* as a force to drive social and political initiatives is not new.<sup>12</sup> In fact, in the populous and often trend-setting state of California, a decade of nativist social policies helped redefine issues of access and equity in public education. In the 1990s, California passed the first in a series of what some viewed as seemingly “progressive” propositions which sought to uphold and protect individual rights. Beginning in 1994, voters passed Proposition 187, otherwise known as “The Save Our State Initiative,” or “S.O.S.” for short. Proponents of Proposition 187 sought to restrict social services for undocumented immigrants residing in the state; they aimed their attack on California’s Mexican immigrant population. Resorting to divisive politics, they characterized undocumented immigrants as “criminal” and “unlawful” by airing sensationalized television ads which portrayed Mexican immigrants swarming across the border. In 1996, voters approved Proposition 209, “The California Civil Rights Initiative,” which ended race-conscious affirmative action in the state’s public higher education system. In 1998, Proposition 227, “The English for the Children Initiative,” followed with the intent to do away with bilingual education. Proposition 227 aimed to finalize the unfinished work of Proposition 187, which by this time found itself in legal limbo.<sup>13</sup> In each case, the authors of these

propositions used strategic language to help sway public opinion in support of their initiatives. Despite the fact that the authors of these propositions hailed overwhelmingly from conservative backgrounds, they couched the propositions in traditionally liberal language. Chávez acknowledges as much in her work *The Color Bind* (1998); chronicling the passage of Proposition 209, she recounts:

When voters walked into the booth in November 1996, they wouldn't be asked to dump affirmative action. They would be asked to support an initiative that prohibited the state from 'discriminating against, or granting preferential treatment to, any individual or group' on the basis of race or gender. Who could disagree with such an exalted principle? The proposal sounded as if it had been written by Martin Luther King Jr. himself (p. 80).

The successful passage of Propositions 187, 209, and 227 was undeniably due in part to how their authors managed to recast race-conscious policies not as social justice, but as discriminatory and unmeritocratic. In spite of the fact that all of these propositions worked to curtail the social services traditionally offered to disenfranchised groups, such as non-English speakers, immigrants, the poor, and Students of Color, the propositions passed. Majority voters were less concerned with the civic benefits of race-conscious social policy than they were with how their own rights and entitlements might be affected. They also cared little about the fact that traditionally under-represented groups would bear the brunt and impact of xenophobic legislation. Finally, in some instances, exit polls also found that voters were confused by how the propositions were framed and presented, resulting in some people voting in favor of propositions they disagreed with (Chávez, 1998). For instance, in the case of Proposition 209, some voters voted against "discrimination" and "preferences" despite being in favor of affirmative action, a term conveniently omitted from the language describing the proposition.

Similarly, critics of the University of Michigan's affirmative action programs also employ premeditated tactics to sway public opinion against race-conscious admissions policies. Perhaps having learned lessons from California's successful passage of Proposition 209, anti-affirmative action advocates utilize their own *language of preference* to discredit the University's race-conscious admissions practices. For instance, the Center for Individual Rights (CIR), which provided lead counsel for both Barbara Grutter and Jennifer Gratz, refer to Michigan's undergraduate practices as an illegal "two-track" admissions program because of the university's supposed under-reliance on grade point averages and standardized test scores in admitting Students of Color. CIR's critique of Michigan's admissions programs implies that the university's modest success in enrolling Students of Color must mean that some impropriety exists in the school's admissions practices. Indeed, in their respective cases, petitioners Barbara Grutter and Jennifer Gratz, as well as their supporters, suggest that the

use of race-conscious affirmative action policies are unlawful because Michigan's aspiration to enroll a diverse undergraduate and graduate student body runs afoul of some of the most traditional American values, such as "meritocracy" and "colorblindness."

Employing this strategic *language of preference*, which describes race-conscious affirmative action programs as "quota-driven" and "preference-laden," proponents for the petitioners, Grutter and Gratz, intentionally obscure the meaning of race-conscious affirmative action in higher education. Therefore, despite the fact that only *qualified* Students of Color are granted admission into highly selective four-year institutions such as the University of Michigan, anti-affirmative action advocates would have us believe that only non-Students of Color earn legitimate admissions offers. In their opening brief for petitioner Jennifer Gratz, the Center for Individual Rights alludes to this point:

Ultimately, what history and the cases bear out is that there is no workable way to employ Justice Powell's framework for the consideration of race and ethnicity in educational admissions. To say that race may be 'weighed fairly' or considered 'competitively' is to say that there is no real standard at all because it is tied only to the subjective interpretations of those who employ it as the measure for what is permissible (p. 47).

Again, the implication of such a statement is that only admissions based purely on traditional indicators such as grade point averages and standardized test scores are free of suspicion.

In addition, in neither the *Grutter* nor *Gratz* opening briefs does the Center for Individual Rights acknowledge the use of legacy admissions, which have historically favored White students with privileged backgrounds. Ironically, it is in his dissent to *Grutter* that Justice Clarence Thomas brings this issue to the fore:

The rallying cry that in the absence of racial discrimination in admissions there would be a true meritocracy ignores the fact that the entire process is poisoned by numerous exceptions to 'merit.' For example, in the national debate on racial discrimination in higher education admissions, much has been made of the fact that elite institutions utilize a so-called 'legacy' preference to give the children of alumni an advantage in admissions. This, and other, exceptions to a 'true' meritocracy give the lie to protestations that merit admissions are in fact the order of the day at the Nation's universities (p. 20).

While Justice Thomas acknowledges the slippery slope of higher education admissions, he also underscores the importance of the normative concept of "true meritocracy." And so, in spite of critiquing the supposed subjectivity of

admissions made according to race-conscious and legacy standards, Justice Thomas also suggests that only “meritocratic” admissions standards should be permissible in higher education.

An intriguing dynamic in these cases is that most anti-affirmative action advocates, White and non-White, conveniently omit the fact that White women have been the greatest beneficiaries of affirmative action policies in higher education and in the work force (Wise, 1998). Instead, critics of race-conscious affirmative action policies revert back to popular beliefs, which have historically considered Students of Color to be the targeted beneficiaries of affirmative action. In this case, the use of an ahistorical and apolitical *language of preference* that casts Students of Color as beneficiaries at the expense of White students enables critics of race-conscious admissions to condemn the policy as discriminatory and un-meritocratic. After all, recognizing the success of White women in higher education and in the work force would do little to support race-neutral critiques of affirmative action policies, and so for this reason anti-affirmative action advocates appear to ignore the topic altogether. Instead, as the *amicus* briefs in both the *Grutter* and *Gratz* cases illustrate, critics of race-conscious affirmative action policies frame their arguments in a *language of preference* that puts emphasis on three major issues, including: (1) meritocracy, (2) colorblindness, and (3) equal opportunity.

### *Meritocracy*

Similar to *Bakke* (1978), the petitioners in *Grutter* and *Gratz* are White students who were denied admissions to selective public universities. Barbara Grutter applied for admission into the University of Michigan’s Law School in 1996. After first being waitlisted, she was denied admission. Grutter claimed that the Law School’s aspiration to enroll a “critical mass” of Students of Color was a “quota” program in disguise. A year earlier, in 1995, Jennifer Gratz applied as a freshman to the University of Michigan’s College of Literature, Science, and the Arts (LSA). Like Grutter, Gratz did not make the first admissions cut and was also waitlisted. After being denied admission, Gratz went on to enroll at the University of Michigan’s Dearborn campus from which she earned her bachelor’s degree in 1999. Gratz claimed that the LSA admissions office operated an illegal two-track admissions system through which “preferred minorities” were given special treatment not extended to White applicants.<sup>14</sup>

In *Grutter*, the Court’s majority opinion not only affirms the use of race-conscious admissions in higher education, the Justices also propose a twenty-five year “sunset clause” at which point they expect affirmative action will no longer be necessary to advance racial diversity in higher education. Citing *Richmond v. J.A. Croson Co.*, 488 U.S. at 510, Justice Sandra Day O’Connor proclaims:

The requirement that all race-conscious admissions programs have a termination point ‘assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself’ (p. 35).

Justice O’Connor’s good faith wish is admirable, but ironic. For, as evidenced in the *amicus* briefs filed in both *Grutter* and *Gratz*, race-conscious policies, such as affirmative action, remain necessary precisely because we continue to live in a society in which racism remains the norm (Bell, 1989; Bell, 1992; Bell, 2004; Bonilla-Silva, 2001; Bonilla-Silva 2003; Omi & Winant, 1994; Winant, 2001) as well as educational inequality (Bowen & Bok, 1998; Oakes, 1985; Orfield & Eaton, 1996).

Post-*Brown v. Board of Education* (1954), Students of Color remain segregated and disproportionately over-represented in over-crowded and under-resourced schools; they continue to have less access to qualified teachers, and they are less likely to benefit from college preparatory curriculum, such as Honors and Advanced Placement (AP) courses (Oakes, 1990; Oakes, 1995; Solórzano, Ledesma, Pérez, Burciaga, & Ornelas, 2003; Solórzano, & Ornelas, 2002; Valencia, 2003). As a result, college-going patterns for Students of Color differ greatly from those of their White counterparts. Despite these facts, there remains a hesitancy to engage in an honest dialogue about how race and racism continue to produce disparate educational opportunities for Students of Color. Instead, critics of race-conscious admissions practices contend that colleges and universities should promote race-neutral admissions practices, judging students solely by “merit” and academic accomplishments. However, what opponents of affirmative action fail to recognize and confront is that students do not exist in ahistorical or apolitical environments. Race-neutral admissions practices are rarely colorblind, and racial preferences, in the form of tracking and disparate *opportunities to learn*,<sup>15</sup> begin long before college. Behind their altruistic façade, “meritocratic” admissions practices work to maintain White privilege and White entitlement (Allen & Solórzano, 2001).

Debates centering on college admissions must therefore take account of the disparate learning opportunities that Students of Color face in K-12 education. Until K-12 learning opportunities are equalized, debates centering exclusively on “merit” are detrimental to under-represented student populations, including Students of Color. Young’s (1990) commentary on “merit” is appropriate in this regard:

For the merit principle to apply it must be possible to identify, measure, compare, and rank individual performance of [education-related] tasks using criteria that are normatively and culturally neutral... Since impartial, value-neutral, scientific

measures of merit do not exist... a major issue of justice must be who decides what are the appropriate qualifications for a given position, how will they be assessed, and whether particular individuals have them (p. 193).

Young, Omi and Winant (1994), Collins (1998), and Guinier and Strum (2001) are just a few of the scholars who suggest that the “merit principle” is inherently flawed because contemporary ideals of meritocracy continue to be constructed to benefit White middle-class males, and not People of Color.

### *Colorblindness*<sup>16</sup>

Appealing to moral values (Lakoff, 2002), opponents of affirmative action call for the cessation of all race-conscious admissions practices. They argue that we have arrived at a time when race is inconsequential. They promote race-neutral policies and rhetoric couched in the language of the Civil Rights Era. An excerpt from the brief for The Claremont Institute Center for Constitutional Jurisprudence filed in joint support of *Grutter* and *Gratz* provides an appropriate example. The brief cites Dr. King’s *Why We Can’t Wait* (1963), in which Dr. King addresses the urgency of the Supreme Court’s desegregation ruling in *Brown v. Board* (1954). The Claremont Institute’s brief suggests that Dr. King’s indictment of pro-segregationists, who opposed *Brown v. Board of Education*, is applicable to modern-day affirmative action. According to The Claremont Institute’s brief, affirmative action opposes the Equal Protection Clause when it employs race-conscious social policies. Citing Dr. King, the brief for The Claremont Institute proclaims,

Indeed, the defiance of today’s defenders of racial classifications is, in some ways, even more pernicious, because their reliance on ‘diversity’ as a governmental interest is one that ‘effectively assures that race will always be relevant in American life’ (p. 23).

Relying on selective quotes from classic Civil Rights heroes, right wing organizations like The Claremont Institute Center for Constitutional Jurisprudence muddle the public debate surrounding affirmative action. Casting civil rights heroes against race-conscious policies is not only insincere, but also deceitful. The brief of Veterans of the Southern Civil Rights Movement and Family Members of Murdered Civil Rights Activists, filed in support of Michigan’s race-conscious policies, reminds us that Dr. King’s legacy was very much aligned with pro-affirmative action forces. As evidence, they also cite Dr. King’s (1963) work, in which he proclaims,

It is impossible to create a formula for the future which does not take into

account that society has been doing something special against the Negro for hundreds of years. How then can he be absorbed into the mainstream of American society if we do not do something special for him now, in order to balance the equation and equip him to compete on a just and equal basis? (p. 6)

Unlike The Claremont Institute Center for Constitutional Jurisprudence Brief, the Brief of Veterans of the Southern Civil Rights Movement et al. recognizes that circumstances that have framed affirmative action are rooted deeply in our history. Therefore, discussions regarding affirmative action must be placed within a larger context to account for the legacies of subordination and oppression suffered by People of Color. It is not enough to argue that we have arrived at a time when race and racism are relics of the past. Race and racism are as prevalent today as in Dr. King's time, though they operate in less overt fashion (Allen & Solórzano, 2001; Bonilla-Silva, 2001; Bonilla-Silva, 2003; Solórzano, 1998; Solórzano, Ceja & Yosso, 2000; Solórzano & Villalpando, 1998). Likewise, White privilege and White entitlement continue to permeate social, educational, and political arenas, including university admissions.

Still, as evidenced by the rhetoric used in support of Barbara Grutter and Jennifer Gratz, critics of race-conscious policies are not persuaded that affirmative action is still necessary. This confusion stems from, among other sources, anti-affirmative action briefs that suggest that race-conscious admissions policies are the root of all social ills in American higher education. For instance, the Center for Individual Freedom, in steadfast opposition to race-conscious affirmative action, declares in its brief, "Whatever the educational merits of a more diverse student body, that interest is simply not *compelling* in a constitutional sense" (p. 2: emphasis original). Similarly, in the brief filed jointly by the Center for Equal Opportunity, the Independent Women's Forum, and The American Civil Rights Institute, these organizations claim, "The value of anything must consider its liabilities. And the liabilities attendant to the use of racial and ethnic preferences are substantial: They are personally unfair and set disturbing legal, political, and moral precedent to allow State racial discrimination" (p. 17). Opponents of race-conscious policies utilize a *language of preference* through which they cast affirmative action policies as inherently "discriminatory," "illegal," and "stigmatizing," thereby suggesting that these policies are divisive and out-of-date. Furthermore, they also contend that the practice of such a policy is in direct opposition to the values and principles promised in our "colorblind" Constitution. In short, briefs supporting *Grutter* and *Gratz* prey on personal libertarian sensibilities by casting race-conscious affirmative action policies as attacks against individual sovereignty and rights.

By contrast, briefs supporting the University of Michigan mention the larger societal benefits of affirmative action. In direct opposition to their

counterparts, pro-affirmative action parties stress the civic benefits of diversity and race-conscious practices. For instance, one of the most important *amicus* briefs cited in the Court's majority opinion in *Grutter* suggests that affirmative action is a matter of national security. Citing the *President's Report* § 7.5.1, the Consolidated Brief for Lt. Gen. Julius W. Becton Jr., et al. notes, "The modern American military candidly acknowledges the critical link between minority officers and military readiness and effectiveness. '[T]he current leadership views complete racial integration as a military necessity – that is, as a prerequisite to a cohesive, and therefore effective, fighting force'" (p. 17). The military not only join the ranks of those defending affirmative action, they also argue that there are no effective substitutes for race-conscious policies.

### *Equal Opportunity*

In the world of higher education, fueled by the belief in meritocracy and borrowing from American work ethic ideals, the notion of equal opportunity, or the concept that all students should be given equal access and resources in order to achieve and succeed, has a long and revered history. Affirmative action opponents propose that "special" race-conscious programs make it impossible for all students to have an equal opportunity to earn admittance into college. Briefs in support of the University of Michigan refute the claims made by anti-affirmative action pundits. For instance, while critics of affirmative action argue that "public universities have ample means to ensure that their services are open and available to all Americans" (U.S. Brief for *Grutter*, p. 13), supporters of affirmative action explain that without race-conscious admissions policies higher education is closed to far too many Students of Color.

As an alternative to race-conscious admissions, critics of affirmative action offer percentage plans, such as those practiced in California, Texas, and Florida. Curiously, in what might be one of the greatest ironies of the *amicus* briefs, the Authors of the Texas Ten Percent Plan clarify that race-neutral alternatives, such as percentage plans, are not feasible in all states. In their brief in support of race-conscious admissions, the Authors of The Texas Ten Percent Plan explain,

. . . these programs are not interchangeable, range widely in their reach, and cannot work in many states that have different racial patterns, college-going patterns, and urban/rural mixes. Urging states to use such plans, even in states without all the requisite ingredients, is chimerical and not grounded in a realistic appraisal of each state's demography, higher education structure and history (p. 4).

Therefore, despite the fact that the U.S. Solicitor General and other prominent



affirmative action opponents herald percentage plans as feasible alternatives to race-conscious practices, the Authors of The Texas Ten Percent Plan once again clarify that there are no generally prescribed alternatives to race-conscious affirmative action. Indeed, concerned parents have already spoken out against what they perceive to be the unfair and biased nature of such plans. For instance, Glater (2004) contends:

Parents whose children have been denied admission to the University of Texas at Austin, the crown jewel of Texas higher education, argue that some high schools are better than others, and that managing to stay in the top 25 percent at a demanding school should mean more than landing in the top 10 percent at a less rigorous one. The dispute shows how hard it is to come up with a system for doling out precious but scarce spots in elite universities without angering someone (p. A133).

As Glater implies, until all schools are equipped to offer equal opportunities to learn to all students, percentage plans will remain a poor substitute for race-conscious policies.

### **Discussion**

Higher education degrees, especially those derived from highly competitive institutions, are an important form of social capital.<sup>17</sup> As recognized by Olneck (2000), “Institutions of higher education play particularly important roles in the designation of capital.” (p.322). Indeed, not only do universities “codify much of the knowledge that constitutes curriculum in lower education . . . the university [also] provides a field of competition that contests who is to be regarded as culturally authoritative” (Olneck, 2000, p. 322). This fact is also recognized in the U.S. Brief filed in support of *Grutter*, in which Solicitor General Olson acknowledges:

A university degree opens the doors to the finest jobs and top professional schools, and a professional degree in turn makes it possible to practice law, medicine, and other professions. If graduate and undergraduate institutions are not open to *all* individuals and broadly inclusive to our diverse national community, then the top jobs, graduate schools, and professions will be closed to some (p. 13: emphasis added).

With the termination of race-conscious policies such as affirmative action, it is most likely that Students of Color will be the ones locked out of these powerful social networks. And with growing populations of Students of Color, the

repercussions of shutting these students out of higher education will extend beyond their communities. Not surprisingly, advocates of race-conscious practices recognize this fact in their defense of affirmative action policies. Paradoxically, some of the nation's most conservative institutions also stepped up in defense of race-conscious admissions practices. Among these were high-ranking retired military officers, Fortune 500 business leaders, and other select members from private industry. In the face of attacks against affirmative action, these organizations acknowledged that race-conscious practices are an important necessity in the global marketplace. The brief from 65 Leading American Businesses (also known as the Fortune 500 Brief) acknowledges as much in stating:

In the experience of the *amici* businesses, today's global marketplace and the increasing diversity in the American population demand the cross-cultural experience and understanding gained from such an education. Diversity in higher education is therefore a compelling government interest not only because of its positive effects on the educational environment itself, but also because of the crucial role diversity in higher education plays in preparing students to be the leaders this country needs in business, law, and all other pursuits that affect the public interest (p. 10).

As recognized by these business leaders, diversity is as much a public good as it is a private good for industry, the military, and institutions of higher education.

Through this affirmative action debate, and the trail of *amicus* briefs filed in its wake, it has become clear that the educational playing field is not yet level, and those who attend highly selective institutions continue to garner positive benefits. Consequently, the question of who deserves to attend selective institutions like the University of Michigan is increasingly politicized. The University of California report, *Freshmen Admissions at Berkeley: A Policy for the 1990s and Beyond* notes:

Racial and ethnic differences in rates of eligibility for the University of California reveal . . . a dramatic pattern: whereas only 4.5 and 5.0 percent of Black and [Latina/o] high-school graduates respectively meet UC eligibility requirements, 15.8 percent of whites and 32.8 percent of Asians do. In trying to construct an admissions policy that is responsive to all of the major social groups that comprise California's population, these differences in rates of eligibility—differences which are themselves rooted in larger patterns of racial and ethnic inequality—constitute a formidable problem indeed. (Karabel, Bailey, Koenigberg, Lin, Mei, Miller, Montgomery, Rodriguez, Wilkerson, 1998, p. 8).

More than a decade later, with African American and Chicano/Latino admission rates still lagging, issues of educational inequality continue to pose challenges not

just for the University of California, but also for institutions of higher education across the country. Yet, in a post-affirmative action California, critics of race-conscious admissions view the drop in U.C. eligibility rates for Students of Color as vindication of their belief in race-blind admissions. These critics suggest that now, in a race-neutral admissions environment, only *truly qualified* students are admitted into the top-tier schools. However, what this argument masks is that in increasingly competitive job markets, higher education degrees from competitive institutions have become an increasingly prized commodity. This fact was most recently recognized by Chang, Witt, Jones, and Hakuta (2003):

If admission to selective universities were not seen as a gateway to other financial opportunities, then race-conscious policies that grant access to that gateway would draw little fire. But clearly, attending and graduating from an elite institution afford significant tangible benefits (p. 8).

Chang et al.'s observation suggests that there are important political repercussions to expanding access to selective institutions of higher education. Arguably, limiting the access to selective institutions is one way to manage the competition for a scarce resource.

Affirmative action is by no means a perfect policy. However, some of its greatest apparent shortfalls are a result of being mischaracterized by a *language of preference* that labels race-conscious practices as “immoral,” “quota”-based, “preferential,” and “discriminatory.” Although affirmative action is much more than this, it remains difficult to challenge this perception when it has become so deeply entrenched in the public consciousness. As Edley (1996) has recognized, “The single most pernicious popular misconception about affirmative action is that it means quotas. Polls show that large majorities are opposed to quotas; and the misconception is convenient for unprincipled opponents of affirmative action, who, in fact, fuel the confusion” (p. 18). Instead of confronting the social, political, educational, and racial mechanisms that continue to produce disparate learning opportunities for Students of Color, opponents of race-conscious affirmative action policies use cases like *Bakke*, *Grutter* and *Gratz* to promulgate concepts of preference, discrimination, and victimization.

In *Bakke*, Justice Powell suggested three major problems with the concept of preference in affirmative action: (1) preference is not always benign, (2) preferences may serve to reinforce “common stereotypes” of ethnic groups, and (3) there is a measure of inequity in forcing innocent persons . . . to bear the burdens of redressing grievances not of their making (p. 36). However, it can also be suggested that there is a major inequity in *not* using “preferences” which are meant to help equalize admission into higher education and combat the reproduction of a status quo that continues to promote and maintain the subordination of women, the poor, and People of Color. And while Justice Powell

argued that “preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake” (p. 28), one might also argue that “colorblind” standards, based upon supposedly impartial qualifications, but which are inherently biased, are also discriminatory. Finally, Williams (1991) reminds us that “if a thief steals so that his children may live in luxury and the law returns his ill-gotten gain to its rightful owner, the children cannot complain that they have been deprived of what they did not own” (p. 101). So too must critics of race-conscious social policies recognize that if they choose to denounce affirmative action on the basis that it unfairly valorizes race, then they must also denounce the injustice of unearned White privilege and White entitlement.

We need to move away from the *language of preference* used by so many anti-affirmative action briefs and instead return to education’s democratic and civic purposes. As Guinier (2003) has recognized, “At the same time that higher education is considered a democratic and educational necessity to many, it remains beyond the reach of all but a few” (p. 2). The move towards pseudo-egalitarian principles, such as those embodied in colorblind admissions policies, helps conceal the fact that race still matters, and that mainstream values continue to benefit Whites. A history of racism, oppression, and colonization continues to manifest itself in the form of housing and educational segregation. Furthermore, inequitable K-12 learning conditions that many Students of Color experience are often incompatible with the selection criteria of selective universities. Admissions criteria, although presented as race-neutral and meritocratic, can be elitist and assimilationist, for example in the expectation that Students of Color must perform and become more like White students in order to earn admission and succeed at selective universities. However, a Critical Race analysis of these educational conditions helps clarify that the “under-performance” of Students of Color in the educational pipeline is best explained by disparate *opportunities to learn*. And until the playing field is leveled at all points in the educational pipeline, Students of Color cannot be held accountable to so-called meritocratic and colorblind admissions standards which have been normed to benefit Whites.

Finally, in the wake of attempts to call for the end of social justice programs such as affirmative action, an open and honest dialogue that challenges hegemonic practices is more necessary than ever before. Such a dialogue might help remind critics of race-conscious social policies that affirmative action was born out of necessity. And, that its fall out of favor is due in large part to how critics have successfully used a language of preference to spin the public perception of affirmative action from a socially just policy to a preference-driven strategy which works to weaken its original rationale and purpose. A look back at the real goals of affirmative action would remind us that the policy’s purpose is to help uphold democracy.

## Notes

<sup>1</sup> In *Regents of the University of California v. Bakke* (1978), a case long considered as the seminal affirmative action case in higher education, Allan Bakke, a White male, brought suit against the Medical School at the University of California at Davis after being denied admission in 1973 and 1974. Bakke contended that UC Davis' practice of designating 16 of its 100 admission slots for traditionally under-represented students, including Students of Color, represented an illegal special admissions program. While the Supreme Court agreed that UC Davis' admissions practices were suspect, the Court also upheld the school's use of race-conscious practices as a "plus" factor in university admissions.

<sup>2</sup> Advocates and critics of race-conscious admissions practices have long debated whether Justice Powell's opinion in *Bakke* represented more than his sole dissenting voice. The importance of Powell's vote cannot be overstated since it sealed the majority vote in favor of affirmative action. In *Grutter* Justice Sandra Day O'Connor writes, "Public and private universities across the Nation have modeled their own admissions programs on Justice Powell's views. Courts, however, have struggled to discern whether Justice Powell's diversity rationale is binding precedent. The Court finds it unnecessary to decide this issue because the Court endorses Justice Powell's view that student body diversity is a compelling state interest in the context of university admissions" (Grutter, 2003, p.3).

<sup>3</sup> For the purpose of this paper the terms "race-conscious admissions" and "affirmative action" will be used interchangeably. In the field of higher education, the term "race-conscious" is used to refer to affirmative action admissions policies which recognize that the racial experiences of all students play a role in their educational endeavors.

<sup>4</sup> For more information on percentage plans see *Appearance and reality in the sunshine state: The Talented 20 Program in Florida* (Marin & Lee, 2003), and *Percent plans in college admissions: A comparative analysis of three states' experiences* (Horn & Flores, 2003). Available at:

[http://www.civilrightsproject.harvard.edu/research/highered/affirmative\\_gen.php](http://www.civilrightsproject.harvard.edu/research/highered/affirmative_gen.php).

<sup>5</sup> The term "Students of Color" is used to refer to traditionally under-represented students in higher education, including Chicana/o and Latina/o, African American, and Native American students. It should also be noted that in the *Grutter* and *Gratz* cases these students were signaled out as "preferred minorities" by opponents of affirmative action.

<sup>6</sup> Palmer (2001) has pointed out that "affirmative action originated more than thirty years ago as a remedial effort to overcome the effects of discrimination. Today, a solid majority of the Supreme Court agrees that this interest remains

sufficiently compelling to support race-based affirmative action. The real debate is over the scope of this: What ‘past discrimination’ is sufficient to justify affirmative action? What ‘present effects’ are sufficient? What evidentiary link must be established between the past discrimination and the present effects?” (pp. 83-84).

<sup>7</sup> According to Black’s Law Dictionary (Gamer, 1999) an *amicus curiae* or *friend of the court* brief may be submitted by court request, or by petition, by a person or person(s) not party to a lawsuit but thought to have a strong interest in the subject matter.

<sup>8</sup> For more information on the history of affirmative action see Witt & Shin, 2003.

<sup>9</sup> It should be noted that 35 *amicus* briefs in support of the University of Michigan were filed in joint support of both the undergraduate and graduate cases, while 12 of the 29 briefs filed in support of *Grutter* and *Gratz* petitioners were also filed jointly.

<sup>10</sup> A partial list of those who submitted *amicus* briefs in support of the University of Michigan’s race-conscious affirmative action policies includes: The American Bar Association; The American Educational Research Association, et al; The College Board; General Motors Corporation; Harvard University, Brown University, et. al; Hispanic National Bar Association; NAACP Legal Defense and Education Fund; National Asian Pacific Legal Consortium, Asian Law Caucus, Asian Pacific American Legal Center; and The National Center for Fair & Open Testing. Some of the organizations in support of petitioners Barbara Grutter and Jennifer Gratz include: The American Civil Rights Institute; The Center for Equal Opportunity; The Center for Individual Freedom; The Claremont Institute Center for Constitutional Jurisprudence; The Independent’s Women’s Forum; and the National Association of Scholars. For a complete list, see <http://www.umich.edu/~urel/admissions/>.

<sup>11</sup> It should be noted that it is not customary for the Solicitor General to participate in Supreme Court cases. Therefore, the fact that the Solicitor General submitted *amicus* briefs in support of petitioners Barbara Grutter and Jennifer Gratz suggests that the Solicitor General and/or the President found the case compelling enough to dedicate time and effort to drawing up an exhaustive pair of briefs. For detailed information on the functions of the Office of the Solicitor General see: <http://www.usdoj.gov/osg/aboutosg/function.html>.

<sup>12</sup> Lakoff (2002) has recognized the importance of language in framing controversial issues. For example, Lakoff suggests that anti-abortion advocates shy away from using the medical terms “embryo” and “fetus,” preferring instead to use the term “baby” to conjure up emotional sympathy for their cause. Likewise, I propose that anti-affirmative action advocates rely on a language that casts race-conscious policies as discriminatory and preferential in order to sway public opinion against affirmative action.

<sup>13</sup> For additional information on Propositions 187, 227, and 209 see: <http://www.americanpatrol.com/REFERENCE/prop187text.html>; <http://primary98.ss.ca.gov/VoterGuide/Propositions/227text.htm>; and <http://vote96.ss.ca.gov/Vote96/html/BP/209text.htm> respectively.

<sup>14</sup> Although much can be said about the strategic use of casting two working class White women as plaintiffs against affirmative action programs in higher education, exploring this topic is not within the range of this paper. Nonetheless, it is important to note that Gratz' co-plaintiff, Patrick Hamacher, a White male, never earned the same recognition as his counterpart.

<sup>15</sup> The notion "opportunities to learn" is borrowed from the work of Jeannie Oakes (1990) who uses the term as a measure of educational equity. Rather than economic parity, Oakes suggests that equitable learning conditions, in the form of resources and qualified teachers, help promote equitable opportunities to learn.

<sup>16</sup> In order to understand the term "colorblindness" it is helpful to refer to Bonilla-Silva (2004), who explains "colorblind racism" as follows: "[An] ideology, which acquired cohesiveness and dominance in the late 1960s, [and which] explains contemporary racial inequality as the outcome of nonracial dynamics. Whereas Jim Crow racism explained blacks' social standing as the result of their biological and moral inferiority, colorblind racism avoids such facile arguments. Instead, whites rationalize minorities' contemporary status as the product of market dynamics, naturally occurring phenomena, and blacks' imputed cultural limitations" (p. 2).

<sup>17</sup> According to Stanton-Salazar (2001), social capital is "a set of properties existing within socially patterned associations among people that, when activated, enable them to accomplish their goals or to empower themselves in some meaningful way" (p. 265). In higher education, students' social capital is heightened when they attend selective colleges and universities.

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