AFFIRMATIVE INACTION: How allowing African-Americans to Opt-Out of Affirmative Action may increase its Efficacy and illuminate its original intent.
When asked how he wished to be remembered, Thurgood Marshall said: "He did what he could with what he had."¹ What Marshall had was a passion for the law and an unwavering vision of how the world should look, what he lacked was access to the elite power structure that could make his vision a reality. For the next generation, Brown v. Board of Education² and Bakke v. California Board of Regents³ would provide African Americans access to the elite institutions and companies that Marshall envisioned, but did this equate to the social, economic and political mobility that many assumed would follow? African-Americans have gained access to the most prestigious academic institutions in the land and have gone on to achieve monumental heights in business and academia,⁴ however, the professional gains have not translated into the overwhelming uplifting and self-sufficiency of the race. While many factors have lead to the lack of upward movement of the race, one would be remiss in not analyzing the role that African-Americans have played themselves in delaying their own communal social, political and economic progress.

Like many African-Americans before me, I entered law school as a self proclaimed advocate on a mission. I viewed a law degree as more then a means to provide income for my family, but more specifically, verification that one had obtained the tools to end poverty, racism, sexism and the many other impediments to social, economic and political justice. I am an African-American male and a first generation college graduate who was afforded an opportunity to train at an elite law school. I state this with the realization that this opportunity may very well have come at the hands of affirmative action and I am unfazed by this implication. I am

⁴ See Sanders infra note 17.
confident in my abilities as an orator, a writer and a leader and it stems from my understanding of the history of the program from which I have benefited.

This essay was written with a sense of urgency as it is ultimately a blueprint for how to best use the 25 years during which Justice Sandra Day O’Connor recommended that affirmative action stand before further review. Part I contends that the use of the “diversity rationale” as the compelling state interest in maintaining affirmative action in *Bakke* was the wrong choice. I argue that the choice is wrong because in the infancy of the program, while there was parallel thought as to whether the program should simply be a means of redressing past discrimination or a tool to create African-American leadership/service for disadvantaged communities, ultimately the “diversity rationale” articulated neither of these goals. This section offers an analysis of the origins of affirmative action and walks through the jurisprudence to determine how and why the original intent was skewed. Part II of this paper discusses why affirmative action is still needed today and more specifically, why a change in the program is needed to reach its original intent. The need for the program is revealed through an analysis of law school admissions in states that abandoned affirmative action. The need for the change is done by offering statistical evidence that African Americans as a whole are not much better off then they were before the program and states that they are complicit in this result. Part III of this essay offers my proposal, an alternative to the current administration of affirmative action. This plan is meant to effectuate the original intent of the program by reinvigorating and challenging African-Americans to reconnect to their communities. Part IV addresses potential critiques of the program and offers a conclusion.
I. Affirmative Action: What Went Wrong?

Affirmative action took a wrong turn on the long road from *Sweatt*\(^5\) to *Grutter*\(^6\). At its creation, there were parallel schools of thought as to why the program was needed with many academics seeking to create African American leaders and intellectuals to serve the African American community and others seeking to provide a redress for past discrimination and blocked opportunities. Ultimately, neither of these rationales was selected as the basis for affirmative action and the results have been less than stellar. This section walks through the history of affirmative action first exploring its original intent and then analyzes jurisprudence to show how that intent was skewed and then abandoned by the courts.

A. Original Intent: Either A or B, but please not C…

The conventional understanding of affirmative action is that it was created to remedy past discrimination by establishing programs that would ensure equal opportunities for African Americans to excel in all aspects of society. The 1950’s, 1960’s and 1970’s would serve as a time for the nation to examine the overall effect that centuries of discrimination had on the employment opportunities education and various other facets of society. The result of this examination was the birth of governmental laws crafted to both prohibit discrimination in employment and provide remedial programs to benefit those recipients of past and present discrimination.

\(^{5}\) See Michael Klarman, From Jim Crow to Civil Rights, Oxford University Press pg. 206; see also The End of Segregation, and the Transformation of Education Law, 5 Rev. of Litig. 3 (1986); see also William C. Kidder, The Struggle for Access from *Sweatt* to *Grutter*: A History of African American, Latino, and American Indian Law School Admissions, 1950–2000, 19 Harv. Blackletter J. 1, 4 (2003) – In *Sweatt*, the Supreme Court unanimously held in 1950 that the Equal Protection Clause gave Herman Marion Sweatt the right to enroll at the University of Texas Law School essentially nullifying segregation in higher education. Further holding that the hastily constructed separate and inferior law school designated for African Americans in Texas was not an adequate alternative. Though the courts sought to require segregated law schools, they could not stop law schools from both altering their admissions standards or making law school a nightmare for students upon their arrival. Herman Sweatt and others had a daily confrontation with the real meaning of inequality. After bravely enduring cross-burnings, tire slashings and racial slurs from students and faculty, Sweatt withdrew from UTLS in 1951 without graduating.

In attempting to determine how pervasive discrimination was in America, then Vice-President Richard Nixon conducted a review and compiled a report addressing the effects of racial discrimination on employment.\(^7\) The report determined that, “the indifference of employers to establishing a positive policy of non-discrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.”\(^8\) The report further determined that schools, training institutions, recruitment, and referral services emulated this nonchalance concerning the inclusion of African-Americans which served to perpetuate the problems of inequity minimizing their opportunities.\(^9\) The crux of the report was that to the extent that society had progressed to the point that overt discrimination was less prevalent, it was because the focus had shifted to a covert, societal means of discrimination.\(^10\)

Covert discrimination arguably is just as debilitating as overt discrimination as they both operate to perpetuate the status quo which during the time of the report meant the retention of discriminatory policies and practices. These covert policies often were not discriminatory on their surface, but the problem was they were formed in an era when African Americans were not welcome. Therefore the continuation of these policies has the effect of excluding African Americans from substantive involvement. The problem as Vice President Nixon saw it is that even when this very issue was exposed, employers, entrenched in their means of operating were

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\(^7\) Carl E. Brody Jr., A Historical Review of Affirmative Action and the Interpretation of its Legislative Intent by the Supreme Court, 29 Akron L. Rev. 291 (1996).

\(^8\) Id. at 302 citing - U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT; A REPORT (1970). The report by the Commission explains that the meaning behind the Equal Protection Clause of the Fourteenth Amendment, the Executive Orders of the previous Presidents, the Civil Rights Act of 1964, and the many other civil rights laws, were intended to combat the denial of the right to full equality in the nation. The general tenor of the Commission also shows an understanding of the real discrimination visited against minorities.

\(^9\) Id.

“indifferent.” This “indifference” served as evidence of both past and current racial discrimination and meant that only government intervention would help to spur African American inclusion. Influenced by the findings of his Vice President, President Kennedy issued Executive Order 10,925, prohibiting discrimination and requiring contractors to pledge to take affirmative action to ensure that applicants for employment be considered without regard to race. The determined goal was to eliminate racial discrimination against African-Americans by providing those entities with government contracts. Throughout the 1960’s and 1970’s affirmative action programs would evolve with the Federal Government taking ever bolder steps to assure equality. While the federal government stated as its original goal, to both prohibit discrimination in employment and provide remedial programs to benefit those recipients of past and present discrimination it would take longer to implement in the academic setting.

A lesser known but equally relevant basis for the creation of affirmative action programs was the leadership/diversity rational. The necessity of a qualified African American bar became a priority in the early 1960’s and was a topic of discussion at the annual meeting of the Association of American Law Schools in 1962. There, in his Presidential Address, Walter B. Gellhorn commented on the shortage of “negro” lawyers in the country and the shortage of “negro” lawyers in law school, stating that this was a, “national problem of considerable

11 Id.
13 Terry Eastland, The Case Against Affirmative Action, 34 WM. & MARY L. REV. 33, 35 (1992) (arguing that whites should not be required to atone for their descendants by being disadvantaged by affirmative action).
14 Id. Brody at 310-311. – Affirmative action programs further evolved during the late 1960s and throughout the 1970s. The first and most important action came in August of 1969 when President Richard Nixon issued Executive Order 11,478, which superseded Executive Order 11,246. This order required all federal agencies and departments to implement "affirmative programs" to effectuate the policy prohibiting discrimination and to provide equal employment opportunity. The EEOC was entrusted with the responsibility of administering the program. In 1978, President Jimmy Carter issued Executive Order 12,067, which granted the EEOC authority to develop standards and guidelines for federal agencies to follow in complying with equal employment opportunity laws. In October of 1978, President Carter issued Order No. 12,086, designating the Secretary of Labor as the party responsible for enforcing Parts II and III of Order No. 11,246 -- the Johnson Order requiring non-discrimination provisions in government contracts. Order 12,086 directed the Secretary of Labor to ensure compliance.
urgency.”\textsuperscript{16} Gellhorn stated that this problem left the “negro” without, “adequate legal representation in far too many instances on the one hand and without responsible, effective leadership on the other.”\textsuperscript{17} Gellhorn felt that it was the legal community’s responsibility to increase the black bar, but even after northern schools had offered substantial scholarships and other aid,\textsuperscript{18} African-Americans still were not pursuing the study of law.\textsuperscript{19} The issue is highlighted when one considers that in 1962, roughly 34 black students graduated from law school in the United States into a black bar that numbered only 2000 in a country with an estimated 20,000,000 blacks.\textsuperscript{20} While the black bar dramatically increased in the next few years, by 1964, still only 200 blacks entered first year classes at predominately white law schools. The other 100 black students starting law school that year did so at one of the six Historically Black Colleges and Universities (HBCUs) and the combined 300 students made up only 1.3% of first year law students nationally.\textsuperscript{21} Legal scholars were now aware of the need for African-Americans in law school, but their efforts to recruit and retain them had fallen dramatically below expectations.

Louis Toepfner, the Vice Dean of the law school would place Harvard at the forefront of the movement to increase the number of African-Americans in the legal profession by instituting the “Special Summer Program” funded by a grant from the Rockefeller Foundation.\textsuperscript{22} The stated goal of the program was to give African-American students, “a first-hand look at law and the study of law, and to introduce them to the responsibilities and satisfactions of a legal career.”\textsuperscript{23}

\begin{thebibliography}{99}
\bibitem{15} See Gellhorn supra note 15.
\bibitem{17} See Sanders supra note 17.
\bibitem{16} Id.
\bibitem{19} See Sanders supra note 17.
\bibitem{20} See Sanders supra note 17.
\bibitem{21} Id.
\end{thebibliography}
He however articulated his second goal as, “encouraging Negro students to become lawyers and helping them in their preparation for law study” it was thought that, “such a program would help law schools in judging the qualifications of Negro students seeking admission.” While the Special Summer Program was an excellent start to diversifying the profession, the next few years would see diversification receive more attention and reach greater heights.

While the federal government was already addressing racial discrimination directly in the employment context, many believe that the push for African-Americans in the legal profession was accelerated by the 1967 revolts in Detroit and Newark and the assassination of Martin Luther King, Jr. in 1968. This combination “produced a general sense of national crisis in race relations.” It is in this hostile climate, that the need for African-American leadership was truly comprehended. In the midst of a civil rights “crisis,” America was forced to negotiate with African-American leaders and it was their choice whether these leaders would be educated, with the ability to debate problems analytically at the table or resort to riots. This reality is arguably why the first true form of affirmative action was created. Because of this, “crisis,” a program similar to that at Harvard Law would be implemented nationally under the Council on Legal Education Opportunity (CLEO).

CLEO was arguably the federal government’s first attempt at an affirmative action-like program. The program, organized by the AALS converged public and private interests.

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24 Id.
26 Id.
27 See CLEO website at http://www.cleoscholars.com/all_about_cleo/index.htm - for more information on CLEO
28 Id.
address the academic needs of promising minority students with sub par academic credentials.\textsuperscript{30}

The CLEO program was unique in that various law schools participated in the program and guaranteed admission to students who successfully completed the program.\textsuperscript{31} The effect was dramatic as African-American law school enrollment increased exponentially in predominately white law schools, from two hundred in 1964-1965 to an estimated five hundred in 1968-1969, eight hundred in 1969-1970 and seventeen hundred in 1973-1974.\textsuperscript{32}

Allowing African-American to enter law schools under different standards had the desired effect of increasing enrollment, but had the undesired effect of increasing the attrition rate and lowering the bar passage rate at many of the top legal institutions.\textsuperscript{33} This phenomenon was directly attributable to the fact that the African-American students were admitted into law school under unconventional standards and then held to the same standards as their white counterparts.\textsuperscript{34} Law schools quickly realized that an alternative was needed, because changing the grading system, retention rules and policies regarding students dismissed for academic performance was starting to unsettle the national bar.\textsuperscript{35}

In 1975, after ten years with the first version of affirmative action, law schools had collected the data necessary to critique and revise their admissions and grading standards.\textsuperscript{36} Law schools prior to 1975 relied heavily on “intangible” characteristics of African Americans believing that the LSAT and undergraduate GPA’s were inadequate means of measuring their

\textsuperscript{29} See SANDERS, supra note 17 - The Council on Legal Education Opportunity (CLEO), organized by the AALS, the Law School Admission Council (LSAC), the American Bar Association (ABA), and the National Bar Association, with funding from the federal Office of Equal Opportunity (OEO) and the Ford Foundation.

\textsuperscript{30} Id.

\textsuperscript{31} Id.

\textsuperscript{32} Id.

\textsuperscript{33} Id.

\textsuperscript{34} Id.

\textsuperscript{35} Michael D. Rappaport, The Legal Educational Opportunity Program at UCLA: Eight Years of Experience, 4 BLACK L.J. 506, 516 (1975).

\textsuperscript{36} Id. at 507.
scholastic aptitude. However, the law schools found that after tracking the performance of African-Americans for a decade, their grades correlated with their LSAT scores and undergraduate GPA’s in the same way as the Caucasians they had admitted. With this revelation, law schools employed a two tiered admissions process with LSAT scores and GPA’s used for all applicants, but with a different scale being administered for blacks and whites.

The second iteration of affirmative action would see African-Americans LSAT scores and GPA’s used to determine their ability to navigate law schools. While this method was deemed by many to be a, “fairer,” method of selecting first year students, there was still a large disparity between the scores that African-American candidates possessed and the scores that white candidates possessed. This gap was so significant that the use of a uniform standard may have reduced the number black candidates in top law schools to nil. To address this issue, admissions officers again developed an alternate system for accessing the strength of African-American applicants. This alternate system or “special admissions track” attacked the dilemma in two fashions; it grouped candidates by race and then compared them academically within that group. It also refocused its attention on “non-numerical data,” such as letters of recommendation and essays as a gauge for promise or potential.

The implementation of affirmative action drew hated arguments from both sides of the spectrum and in the spring of 2003, the legal academy was bombarded by scholarship regarding its necessity. A compelling article was the collaborative effort of the Black Law Student Associations of Harvard, Stanford and Yale Law Schools collectively referred to as “The

37 Id.
38 See Sanders supra note 17.
39 Id.
40 Id.
41 Id.
This article is unique because in understanding the adamancy of African-Americans in preserving affirmative action, substantial value is added when those students who are arguably receiving the most valuable benefit have a voice. The BLSAs first make a distinction between the elite law schools and other law schools by highlighting the differences in their mandates. They state that, the “commonality about the missions of our respective institutions and elite law schools more generally,” is their, “public commitment to tackling the most complex and challenging social and legal problems faced by our multiracial democracy.” They further state that choosing law students based purely on basis of their LSAT scores GPA’s and other past achievements would make it difficult for these law schools to achieve this mandate. Thus, they argue, “it is imperative that these schools admit and train a racially diverse student body that is equipped to confront enduring American challenges such as racial inequities in the administration of criminal justice, public education, health care access, and employment opportunities.”

The BLSA’s argument is that affirmative action increases the number of minorities in all aspects of the legal profession. This same justification for affirmative action was advanced at the district court in Regents of the Univ. of Cal v. Bakke. There the Board of Reagents for U.C. Davis articulated two of the original goals of the program “improving the delivery of health-care services to communities currently underserved” and seeking to offer a redress for a history of past discrimination. Justice Powell addressed the latter by stating that, “It may be assumed that

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44 Id at 47.
45 Id at 48.
46 Id.
47 Id.
48 Id.
50 Id.
in some situations a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal.\textsuperscript{50} Justice Powell chose to use the diversity argument because he felt that reinforcing the, “academic freedom” at universities was the strongest argument in providing a compelling state interest. Understanding the origin of the affirmative action program provides strong evidence that the diversity rationale was not the proper justification for affirmative action. The original intent of the program was to either create African American who would provide legal service and leadership for the African American community or supply a redress for past discrimination and choosing the diversity rationale as a means of justifying the program did not reach either goal.

B. Affirmative Action Jurisprudence

The onslaught on affirmative action began in 1974 with DeFunis v. Olegard.\textsuperscript{51} DeFunis applied to the University of Washington School of Law (UWLS) and upon being denied admission filed an equal protections suit against the school.\textsuperscript{52} He argued that by admitting 37 minority students using a different admissions standard, his rights were violated and though the Supreme Court never reached the merits of the case, his claim had a galvanizing effect.\textsuperscript{53} This is evidenced by the twenty-six amici curiae briefs filed, a Supreme Court record at the time,\textsuperscript{54} as well as the deeply divided opinion of the court as to whether they should reach a decision on the cases merits.\textsuperscript{55} Legal academics began asking tough questions about the merit of a policy which

\begin{itemize}
\item \textsuperscript{50} Id.
\item \textsuperscript{51} DeFunis v. Olegard, 416 U.S. 312 (1974).
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{55} De Funis, 416 U.S. at 348-349
\end{itemize}
some termed as “benign discrimination.”56 While UWLS offered its rationale for its program including among other things the desire to remedy past discrimination,57 Erwin Griswold, former Dean of Harvard law school stated that their program was too far reaching.58 In the wake of the courts decision, or lack thereof, legal scholars such as Harvard Law Professor Louis Henkin considered it a reprieve and a time for both sides to formulate thoughts, forecasting that issue would be revisited soon.59 Henkin was right and when *Bakke* was argued, the lines were drawn.

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56 Louis Henken, DeFunis Symposium, 75 Colum.L.Rev. 483 (1975).
57 De Funis, 416 U.S., 345-348 – UWLS prepared a statement of its policy, presumably in response to *DeFunis*. In relevant part, it says:
Admissions

§1. The objectives of the admissions program are to select and admit those applicants who have the best prospect of high quality academic work at the law school and, in the minority admissions program described below, the further objective there stated.

§6. Because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting underrepresentation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem.

Qualified minority applicants are therefore admitted under the minority admissions program in such number that the entering class will have a reasonable proportion of minority persons, in view of the obligation stated above and of the overall objective of the law school to provide legal education for qualified persons generally. For the purpose of determining the number to be specially admitted under the program, and not as a ceiling on minority admissions generally, the faculty currently believes that approximately 15 to 20 percent is such a reasonable proportion if there are sufficient qualified applicants available. Under the minority admissions program, admission is offered to those applicants who have a reasonable prospect of academic success at the law school, determined in each case by considering the numerical indicators along with the listed factors in Section 2, above, but without regard to the restriction upon number contained in that section.

No particular internal percentage or proportion among various minority groups in the entering class is specified; rather, the law school strives for a reasonable internal balance given the particular makeup of each year's applicant population.

As to some or all ethnic groups within the scope of the minority admissions program, it may be appropriate to give a preference in some degree to residents of the state; that determination is made each year in view of all the particulars of that year's situation, and the preference is given when necessary to meet some substantial local need for minority representation.

58 Erwin Griswold, *Some Observations on the DeFunis Case*, 75COLUM.L. REV. 512 (1975) - Dean Griswold describes the admission process in *DeFunis* as "poorly conceived," and believes that Washington went "overboard" in admitting thirty-seven minority students on a preferential basis. He suggests that ten cases "carefully documented," and compared to some rejected would have been easier to defend.

59 See Henkin supra note 61. – The Supreme Court has given us another year or two to ponder what we are trying to achieve and how we might achieve all or much of it, at least cost to other values and to competing rights. Indeed, the
By 1978, Allan Bakke would be at the center of the second major assault on affirmative action and race based admissions policies and four years after Bakke, the country was again ready to weigh in. The fact that nearly twice as many amici curiae briefs as DeFunis were submitted for Bakke signaled the mood of the country. In Bakke the Supreme Court would once again be tasked with making a program that many believed was established to remedy past discrimination fit into a constitutional box. Again the challenge came from a white student denied admission on the base of his race and the claim was that there had been an Equal Protection Clause violation. Once it was determined that the Equal Protection Clause was applicable to white males, the strict scrutiny standard would apply and only evidence of a compelling state interest could justify the special program implemented at UC Davis. The four justifications provided for the special admissions program were, (1) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body." Justice Powell would provide the critical swing vote for two divergent majority rulings.

While the Court could not assemble a majority, a plurality of the Court, joined by Powell, both validated and invalidated affirmative action programs. The point of contention was the

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60 See Bakke supra note 53.
61 See Kearney & Merrill, supra note 59, at 831.
62 See Bakke supra note 53.
63 Id.
64 Id. at 306.
level of scrutiny to be applied to affirmative action programs which provide a preference based on race and are intended to address discrimination and its effects on those burdened. The conservative Justices on the court preferred a strict scrutiny analysis, which meant that any racial classification would be suspect and garner high level scrutiny. Justice Powell would join the conservative block to strike down the affirmative action program at the UC Davis Medical School, ruling that having a dual track admissions plan with a predetermined number of places reserved for minorities violated the Equal Protection Clause. However, the liberal justices on the court would arguably have victory as well. They entered the debate hoping to analyze this issue using intermediate scrutiny. The “benign discrimination” experienced by whites in their opinion was miniscule in comparison to the overall goal of remedying past discrimination and its lingering effects. This school of thought would have allowed remedial programs initiated to combat past and present racial discrimination to receive a lower level of scrutiny.

The opinion written by Powell was so nuanced that initially the ideological shift was not apparent, but review of the reasoning showed a shift in the racial paradigm that existed to that point. Up until this point, the belief by administrators at UWLS and UC Davis expressed rationale for affirmative action that traditionally had been unquestioned, it was a benefit conferred to remedy past racial discrimination. However, in Bakke the Supreme Court would abandon this ideology finding that that benign discrimination was still discrimination and still at conflict with the Constitution. The court therefore turned to another justification offered by U.C. Davis to institute the program, creating a more diverse student body.

65 The group that preferred strict scrutiny included Justices Powell, Stewart, Rehnquist and Stevens.
66 See Bakke supra note 53 at 315-320.
67 The group that preferred intermediate scrutiny included Justices Brennan, Blackmun, and Marshall.
68 See Bakke supra note 53 at 315-320.
69 Id.
70 See DeFunis and Bakke.
In supplanting the past redress basis for affirmative action with the diversity rationale for affirmative action, Justice Powell wrote that the latter was “clearly is a constitutionally permissible goal for an institution of higher education.”\(^{71}\) Powell listed the right of a university to its academic freedom as a basis for championing diversity and quoted the “four essential freedoms,” that establish academic freedom articulated by Justice Frankfurter.\(^{72}\) Justice Powell would go on to say that race or ethnic background could be used by admissions boards as a “plus” factor in an applicant’s file, but that race or ethnicity could not alone guarantee admission.\(^{73}\) In addition to the *Bakke* opinion being a retreat from traditional notions of affirmative action the lack of any clear test in Bakke to distinguish illegal discrimination from the legal pursuit of diversity left schools free to evade Powell's intent.\(^{74}\) This, “flaw” would reveal itself in the aftermath of Bakke when college administrators were forced to manage the business of, “diversity” without any guidance from the court and would lead to more challenges to affirmative action.

While the Decision in *Bakke* weakened affirmative action, by taking a system that was based on the societal benefit of righting a past wrong and in its place leaving a system based on an unsound legal argument. The door had been left ajar and in 1996 The Fifth Circuit Apellate Court came knocking. When the decision in Hopwood v. Texas\(^{75}\) was rendered in the Fifth Circuit and denied certiorari by the Supreme Court, many thought affirmative action was nearing the end of its rope.\(^{76}\) In Hopwood, the district court found that the system at the University of

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\(^{71}\) See *Bakke* supra note 53 at 312.

\(^{72}\) Id. - 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms" of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." See also, *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957)

\(^{73}\) Id.

\(^{74}\) See Sanders supra note 17.

\(^{75}\) Hopwood v. Texas, 78 F.3d 932, 944-946 (5th Cir. 1996).

\(^{76}\) See Sanders, *supra* note 53.
Texas violated the plaintiffs’ equal protection rights, however it allowed the law school to continue imposing a system of racial preferences, awarded the plaintiffs no damages, and did not grant them admission to the law school.77 The Fifth Circuit Appellate Court would reverse concluding that despite the goal of creating greater diversity and correcting past discrimination, the law school could not discriminate based on race in its admission policies.78 The appellate court concluded “Justice Powell’s view in Bakke is not binding precedent on the issue of diversity in education… [because], while he announced the judgment, no other Justice joined in that part of the opinion discussing the diversity rationale.”79

In 1997, the decision in Smith v. University of Washington Law School80 would further muddy the waters of affirmative action. In Smith the issue was again whether race can be used as a criterion in an admissions policy in pursuit of diversity under Bakke.81 The petitioner argued that because of Hopwood, race should no longer be considered a constitutionally permissible factor in law school admissions, but the Ninth circuit court ruled that Bakke was still binding precedent until overruled by the Supreme Court.82 Smith served as yet another example of how the debate had complete shifted from the original intent of affirmative action. With the Supreme Court choosing to deny certiorari both proponents and opponents had ammunition going into the battles that would ensue in both Grutter v. Bollinger and Gratz v. Bollinger.

77 See Hopwood supra note 80 at 944-946.
78 Id.
79 Id.
80 Smith v. Univ. of Wash. Law School, 233 F.3d 1188 (9th Cir. 2000).
81 Id.
82 Id. - The Ninth Circuit first made a statement on the holding in Bakke stating (In the Bakke decision, a majority would have allowed for some race-based considerations in educational institutions, both under Title VI of the Civil Rights Act of 1964, and under U.S. Const. amend. XIV. Thus, a race-based possibility must be taken to be the actual rationale adopted by the United States Supreme Court. Certainly, Justice Powell's opinion has often been cited approvingly in that regard.) The court then made a statement regarding the ability of the Fifth Circuit’s decision in Hopwood and its effect on Bakke – (The United States Supreme Court has admonished that other courts should not conclude that its more recent cases have, by implication, overruled an earlier precedent. On the contrary, it has said, if a precedent of the United States Supreme Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to the United States Supreme Court the prerogative of overruling its own decisions.)
In Gratz v. Bollinger, two Caucasian students were denied admission to the University of Michigan College of Literature and Science (LSA).\textsuperscript{83} They argued that because the school was giving a raced based benefit, that even in light of all of the additional factors\textsuperscript{84}, the system had the effect of, “virtually every qualified applicant from an “underrepresented minority group” being admitted.\textsuperscript{85} In the Gratz companion case, Grutter v. Bollinger, Barbara Grutter, a white Michigan resident was denied admission to the law and argued that her application was rejected because, “the Law School uses race as a "predominant" factor, giving applicants who belong to certain minority groups a significantly greater chance of admission than students with similar credentials from disfavored racial groups.”\textsuperscript{86} The nation would have to wait until June of 2003 for the Supreme Court to ultimately decide that Justice Powell’s decision was still good law and just as Justice Powell had done in 1978, Justice O’Connor would play to both sides of the aisle. O’Connor sided with the majority in ruling against the system used in Gratz, but would be the swing vote while ruling against Grutter.\textsuperscript{87} The majority in Grutter held that diversity in a university environment as stated in Bakke was still a compelling state interest.

The difference between \textit{Grutter} and \textit{Gratz} as Justice O’Connor saw it was still the difference between a “plus” system and a quota.\textsuperscript{88} Grutter argued that the law schools system of tracking the number of minorities that had accepted offers for admission is proof of their desire

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\item \textsuperscript{83} Gratz v. Bollinger, 539 U.S. 244 (2003).
\item \textsuperscript{84} Id. at 244 - The Petitioners filed suit alleging that the University’s use of racial preferences violated the Equal Protection Clause of the Fourteenth Amendment, Title VI of the Civil Rights Act of 1964, and 42 USC § 1981 [42 USCS § 1981]. The petitioners were referencing the University’s Admissions Policy which used, “high school grades, standardized test scores, high school quality, curriculum strength, geography, alumni relationships, leadership, and race.”
\item \textsuperscript{85} Id.
\item \textsuperscript{86} See Grutter \textit{supra} note 6.
\item \textsuperscript{87} See Grutter and Gratz.
\item \textsuperscript{88} See Grutter \textit{supra} note 6 at 306. – “In the context of a higher education admissions plan, truly individualized consideration demands that race be used in a flexible, nonmechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a “plus” factor in the context of individualized consideration of each and every applicant.”
\end{itemize}
to reach a quota, but O'Connor stated that paying, “Some attention to numbers, without more, does not transform a flexible admissions system into a rigid quota.” Therefore, the system used in Gratz was impermissible because benefits to minorities were awarded in a “mechanical fashion,” by assigning twenty points for their race during the admissions process. However, the law schools “non-mechanical method of using race was permissible because, “the school made its race-blind index the starting point of a deeper inquiry into each student's potential contribution to the school's intellectual strength and diversity, a process that included consideration of applicant race.”

In analyzing the jurisprudence of affirmative action from DeFunis to Grutter, it has been a consistent retreat from what many considered to be the original goals of affirmative action. Professor Jack Greenburg analyzed the distinctions in Bakke and Grutter and found the difference to be that Justice O’Connor’s rationale was forward looking while Justice Powell’s was more concerned about the past and present state of minorities. This analysis was based in part on Justice O’Connor’s reliance on the briefs from corporate American and retired military officers. Greenburg wrote,

Affirmative action as a remedy for societal discrimination is not the same as Justice O'Connor's thesis, which does not refer to societal discrimination at all. It refers to social conditions, some of which did and some which did not result from discrimination. Her eye is on the condition of society and what affirmative action can do to help fix it, not what caused the condition.

89 Id.
90 Id.
91 See Sanders, supra note 53.
92 Jack Greenberg, Diversity, the University, and the World Outside, 103 Colum. L. Rev. 1610 (2003).
93 See Grutter supra note 6 at 330,331 (citing Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents at 5, Grutter (No. 02-241), Gratz (No. 02-516); Brief of General Motors Corp. as Amicus Curiae in Support of Respondents at 3-4, Grutter (No. 02-241), Gratz (No. 02-516)) “Corporations have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse peoples, cultures, ideas, and viewpoints.”; Id (quoting Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents at 5, Grutter (No. 02-241), Gratz (No. 02-516)), “[A] highly qualified, racially diverse officer corps ... is essential to the military's ability to fulfill its principal mission to provide national security...these benefits are not theoretical but real.”
94 See Greenburg supra note 97 at 1621.
Greenburg argues while Bakke did consider societal rationales for diversity such as the Leadership/Service rationale, ultimately the language used never conferred a specific benefit on minorities, but to the contrary could have been taken to benefit whites.\(^95\) Greenburg argues that O’Connor was much more direct in her language for affirmative action stating that she was interested in creating a student body that, “better prepares students for an increasingly diverse workforce and society; the need for a “highly qualified, racially diverse officer corps [as] essential to the military's ability to fulfill its principal mission to provide national security”; and “law schools [as] the training ground for a large number of our Nation's leaders.” For O’Connor and the majority, affirmative action is not about a past redress, but rather a means to assure, “Effective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized.”\(^96\)

Affirmative action could have looked starkly different today. While we have become accustomed to the diversity rationale for affirmative action, the U.C. Davis Board of Regents offered four additional reasons for such a program.\(^97\) The court found the fourth goal to be the most compelling, with Justice Powell commenting that, the creation of a more diverse student body, “clearly is a constitutionally permissible goal for an institution of higher education.”\(^98\)

While Powell was enamored with the idea of diversity for diversities sake when asking what

\(^{95}\) Id at 1618,1619 “What I find more interesting than the diversity argument about the O'Connor opinion in Grutter is its further justification of affirmative action for what it does for society as a whole. Justice Powell in Bakke only hinted at it when he wrote that "the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." But that sentence does not necessarily contemplate the presence of both blacks and whites among the nation's leaders, only that the leaders, who might all be white, should be attuned to a diversity of ideas and mores. Powell did consider the University's argument that admitting minorities to medical school would produce more minority doctors and be good for the health of the minority community. But he found that there was no evidence to support its contention.

\(^{96}\) See Grutter supra note 6 at 2340,2341.

\(^{97}\) See Bakke supra note 53 at 312 - The four justifications provided for the special admissions program were, (1) “reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, (2) countering the effects of societal discrimination; (3) increasing the number of physicians who will practice in communities currently underserved; and (4) obtaining the educational benefits that flow from an ethnically diverse student body.”

\(^{98}\) Id.
went wrong with the plan, the answer is clearly his choice for taking affirmative action out of its
traditional model as a redress for past discrimination toward African-Americans and making it a
plan based on diversifying the classroom.

II. Broken but Needed: Analyzing the State of the Affirmative Action

One of the most polarizing aspects of Justice O’Connor’s opinion in *Grutter* was the
notion that affirmative action should only be needed for 25 more years. One of the most
interesting questions is how one defines need. This section of the essay seeks to show that
affirmative action is still needed to provide access for African Americans to elite institutions, but
offers that the program as it exist today is not having the socially transformative effect that many
envisioned.

A. Affirmative Action is needed now and for the foreseeable future

Harvard Law Professor Lani Guinier conveys the necessity that an affirmative action
program is still needed at elite law school in her essay.99 She makes this point through an
analysis of the empirical data collected from a study on Michigan Law’s affirmative action
program. The study she used, done by Lempert, Chambers, and Adams, followed the careers of
three generations of students of color admitted to the University of Michigan Law School and is
a strong indicator that some type of affirmative action program is vital in advancing societal
interest.100 Guinier interprets this studies findingd to mean that, “[I]f a school wishes to choose
students who will have successful legal careers, true to the spirit of a publicly funded university,
affirmative-action-type admission processes are far superior to generic test-based ones.”101 So
even though statistics indicate that the African-American law student are not reaping as large a

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100 *Id.*
101 *Id.*
benefit from affirmative action as anticipated, Caucasian students benefit from a diverse student body which facilitates a diverse learning environment and the public is afforded leaders and service oriented attorneys.\textsuperscript{102}

The perceived benefit of affirmative action to the community at large is one reason why people are often unwilling to think critically about affirmative action, but another large reason is the alternative, life without affirmative action. Not often in history are we given the opportunity to have a controlled experiment where all variables are held constant while one is changed. The states of California\textsuperscript{103}, Texas and Washington\textsuperscript{104} gave us just such an experiment in ending affirmative action in their law school admissions. An analysis of admissions data at five law schools reveals the impact of not having an affirmative action program of some sort on African-American enrollment.\textsuperscript{105} The data shows that at Boalt Hall, UCLA, UC Davis, Texas and Washington School of Law, there was a significant drop in African-American enrollment after the affirmative action program was abolished.\textsuperscript{106} Prior to the ban of affirmative action, blacks made up 6.65\% of the enrollment at these five schools collectively, however after the ban enrollment dropped to 2.25\%.\textsuperscript{107} While the belief was that blacks had reached a point when an

\textsuperscript{102} \textit{Id.}
\textsuperscript{103} See Kidder \textit{supra} note 32.- The first prohibition on affirmative action occurred when the UC Regents approved SP-1 in July 1995, which ended race-conscious admissions at the graduate and professional levels beginning on January 1, 1997, and the undergraduate level one year later. This was followed up with Proposition 209, a November 1996 voter-backed amendment to the California Constitution that took effect in January of 1998. In the 1996 case of Hopwood v. Texas, a challenge to the affirmative action program at the University of Texas Law School, the Fifth Circuit ruled that diversity (i.e., the educational benefits that flow from having racially diverse learning environments) was not a compelling governmental interest. This ruling had the effect of prohibiting race-conscious admissions at public and private higher educational institutions in Texas, Louisiana, and Mississippi.
\textsuperscript{104} \textit{Id.} - Washington voters passed Initiative 200, a ballot initiative with wording identical to Proposition 209, in November 1998. Finally, the "One Florida" plan, adopted in November 1999 by Governor Jeb Bush's executive order, discontinued race-conscious affirmative action in the Florida public university system beginning in 2000 at the undergraduate level and in 2001 at the graduate and professional levels. Although the "One Florida" plan grants students who graduate in the top twenty percent of their high school class a spot in at least one public university, there is no analogous admissions plan for law, medical, business, and graduate schools.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Id.}
\textsuperscript{107} \textit{Id.}
affirmative action type program was no longer needed, the ban of affirmative action and the
subsequent drop in African-American enrollment placed these law schools at African-American
enrollment percentages that had not been seen since before affirmative action had been
implemented.\textsuperscript{108} For example:

At Boalt Hall, African Americans were 2.7\% of enrollments from 1997 to 2001. By comparison,
Blacks were 9.0\% of enrollments in the first five years in which affirmative action took full effect
(1968-1972). Likewise, African Americans were 7.5\% of enrollments at UCLA in the first five
years of affirmative action (1967-1971) but only 2.3\% of enrollments thirty years later (1997-
2001). The University of Texas came full circle as well, as a half-century of hard-fought yet
halting progress was erased. In 1951, Herman Sweatt and the five other African American entrants
to the first post-de jure segregation class at UT constituted 2.1\% of enrollments. African
Americans were a nearly identical proportion of enrollments (2.2\%) at UT in 1997-2001. The
extent to which Boalt, UCLA, and UT became resegregated is particularly disheartening in light of
the recent history of those institutions. Boalt Hall and UCLA combined to award nearly 600 law
degrees to African Americans between 1987 and 1997, and UT produced some 650 Black
attorneys prior to Hopwood. It should also be noted that African Americans were 11.1\% of the
national applicant pool from 1993 to 1996 and a slightly higher 11.4\% from 1997 to 2000.\textsuperscript{109}

So the data would seem to show that affirmative action is necessary, but the diversity
model simply has not worked at systematically changing the predicament of blacks as a
whole.

B. Evidence that Affirmative Action is Broken

While scholars such as Guinier highlight the necessity of an affirmative action
program in assuring that African-Americans retain equal access to elite law schools, the
reality is that the program as it exist has not revolutionized the legal profession. While
affirmative action has led to an increase in the number of African-Americans who
matriculate and pass the bar, those that do find that their degree does not carry the same
value as their Caucasian counterparts. This is a phenomenon that Harvard Law Professor
David Wilkins calls the, "equity paradox."\textsuperscript{110} This paradox is rooted in the fact that

\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} David Wilkins, \textit{Law School Affirmative Action: An Empirical Study Rollin' On the River: Race, Elite Schools,
though the most important factor in the future career success of the African-American attorney is the prestige of the school from which they graduated, they still face a ceiling in their careers based upon their race.\textsuperscript{111} In describing the success of African-American attorney’s, Wilkins references the river metaphor first coined by William Bowen and Derek Bok.\textsuperscript{112} In applying this metaphor, Wilkins states that African-Americans derive benefits from attending elite law schools and in particular the University of Michigan. He stated that,

“[T]he "big wheel" of the University of Michigan "keeps on turning" throughout the careers of all its graduates, allowing both blacks and whites to roll on rivers that are off limits to most law school graduates who cannot "hitch a ride" on a similarly elite "river boat queen." How far one travels on this mighty river - and what work one has to do to get there - however, vary considerably. For those "who never saw the good side of a city" before entering law school, the shoals that can derail a career are likely to be - and equally important, are likely to be seen as being - considerably more perilous than for those whose backgrounds have better prepared them for this often dangerous journey."\textsuperscript{113}

This is yet another reference to the equity paradox which is to say that even though African-Americans may have the same degree as Caucasians, the wealth and the social standing that whites had prior to entering law school still gives them a distinct advantage when navigating through life. This is not to say that all African-Americans encounter these same roadblocks, simply the majority. Sander’s data shows that, “when blacks pass the bar and enter the job market, they encounter a generally positive climate. Blacks earn 6\% to 9\% more early in their careers than do whites seeking similar jobs with similar credentials, presumably because many

\textsuperscript{111} Id.

\textsuperscript{112} WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG–TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS, (Princeton, N.J.: Princeton University Press. 1998). - The authors are the economist William G. Bowen, President of The Andrew W. Mellon Foundation and former President of Princeton University, and Derek Bok, former President of Harvard University and former Dean of the Harvard Law School. Bowen and Bok argue that we can pass an informed judgment on the wisdom of race-sensitive admissions only if we understand in detail the college careers and the subsequent lives of students-or, to use a metaphor they take from Mark Twain, if we learn the shape of the entire river. The heart of the book is thus an unprecedented study of the academic, employment, and personal histories of more than 45,000 students of all races who attended academically selective universities between the 1970s and the early 1990s.

\textsuperscript{113} Id.
employers (including government employers) pursue moderate racial preferences in hiring.”

However the problems still lies in the fact that so few blacks are graduating with similar credentials that this total is negligible.

In addition to the problems experienced by the elite, the benefit of affirmative action also has not trickled down to the African American community. In 1997 during President Clinton’s Initiative on Race, he tasked his Council of Economic advisors in conjunction with the Federal statistical agencies to analyze the progress made by African Americans (non-hispanic blacks) as compared to Caucasians (non-hispanic whites) for three decades and the results were telling. The report issued focused on seven categories regarded as “key indicators” in analyzing progress. The seven categories were population, education, labor markets, economic status, health, crime and criminal justice, and housing and neighborhoods. For the purpose of this article I focused on the results found in education, labor markets, economic status and housing and neighborhoods as I felt that these categories best correlate to presumed gains from Affirmative Action.

The research on educational disparities focused on the segment of the population between the age of 25 and 29. Starting in 1965, the researchers analyzed the numbers of people with 4 year degrees in this age band and tracked the percentage change over three decades. The data showed that in 1965, 6.5% of African Americans had 4 year degrees as compared 13% of their white counterparts. In 1997, 14% of African Americans had 4 year degrees versus 33% percent of their white counterparts. While African American college graduates had increased

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114 See Sanders supra note 17..
116 Id. – pg. 14.
117 Id. – pg. 14.
118 Id. – pg. 26 citing data from the Bureau of Labor Statistics.
119 Id. – pg. 22 citing data from the Bureau of the Census and National Center for Education Statistics.
during the time period, even with the relaxed standards provided by Affirmative Actions, their white counterparts nearly tripled the gap between them from 6.5% to 19%.\textsuperscript{120}

The labor market is another area where we would expect to see the benefits of increased access to schools for African Americans, but the numbers tell a different story. In analyzing the labor markets, key indicators of economic stability include the unemployment rate, the investment in labor market skills and wages.\textsuperscript{121} African Americans consistently perform poorly in all three categories. The African American unemployment rate remains consistent at 10% which is twice that of their Caucasian counterparts.\textsuperscript{122} In terms of investment in labor skills, About 20 percent of young black men are neither in school nor working, compared with 9 percent of young white men. Yet another indicator that increased access to education has not meant wholesale change are wage statistics. The wages of white men continue to exceed those of all other groups of workers. During the infancy of the modern version of affirmative action, the 1960’s to mid-1970’s, the disparity between pay for blacks and whites decreased.\textsuperscript{123} However, the next two decades saw the continuous decline of wages for African Americans even as the percentage of those with 4 year degrees continued to rise.\textsuperscript{124}

Another area where we would expect to see gains by African Americans due to affirmative action would be in their economic status which is most often measured in terms of median and average income and position with respect to the poverty line.\textsuperscript{125} The average income of American families has increased markedly over the past 50 years. Between the mid-1970s and

\textsuperscript{120} Id. – pg. 22 citing data from the Bureau of the Census and National Center for Education Statistics.
\textsuperscript{121} Id. – pg. 23.
\textsuperscript{122} Id. – pg. 26 citing data from the Bureau of Labor Statistics.
\textsuperscript{125} See \textit{supra} footnote 120 – pg. 33 citing data from the Bureau of the Census.
the early 1990s, however, the median family incomes of blacks and Hispanics were stagnant, whereas the median income of non-Hispanic whites generally increased.\textsuperscript{126} The result is that three decades after the advent of affirmative action, the ratio of African American median income to Caucasian median income was the same. In 1965 the median income for an African American family of four was $21,000 while their Caucasian counterparts had a median income of $36,000. Three decades later African Americans median income had increased to $27,000 while their Caucasian counterparts saw their median income climb to $47,000 over this same period. With respect to the poverty line, African Americans and Caucasians saw stark declines in their poverty numbers from 1965 to 1970 but since 1970, they both have remained relatively flat. The percentage of African Americans at or below the poverty line has been roughly 30% while their Caucasians counterparts have seen their numbers drop to roughly 11%.\textsuperscript{127}

Housing and Neighborhoods is yet another indicator of how people are positioned in society. One of the most visible housing indicators is home ownership. Over the past three decades, African American home ownership has hovered around 46% while Caucasian home ownership has hovered around 72% with no reduction of this disparity.\textsuperscript{128}

DC Appellate Judge Harry Edwards offered further evidence for a need for a change in affirmative action as he highlighted the dearth of lawyers serving the public in his 1990 Commencement Address at New York University School of Law.\textsuperscript{129} Judge Edwards used Harvard Law School as a model for this phenomenon where he stated that in 1988 only 5 out of the 546 law students opted to go directly into public interest work.\textsuperscript{130} He blamed this on the focus on prosperity and the tension in the profession between the "total commitment model" in

\begin{itemize}
\item \textsuperscript{126} Id at pg. 33 citing data from the Bureau of the Census.
\item \textsuperscript{127} Id at pg. 33 – pg. 35 citing data from the Bureau of the Census.
\item \textsuperscript{128} Id at 62 - citing data from the Bureau of the Census.
\item \textsuperscript{129} Harry Edwards, \textit{A Lawyers Duty to Serve the Public Good}, 65 N.Y.U.L. Rev. 1148 (1990)
\item \textsuperscript{130} Id.
\end{itemize}
which “the lawyer should do everything for the client that the client would do for himself if he
had the lawyer's skill and knowledge” and the standard of "public spiritedness," which says that
as a part of their professional role, lawyers have a positive duty to serve the public good.131
Judge Edwards argued that the departure from the service oriented nature of the profession has
had an adverse effect on the perception of lawyers in the community. David Wilkins also talks
about the drift from service in his article where he notes that, “lawyers in top firms…currently
devote a mere three percent of their total billable hours to pro bono work.” 132 Furthermore, just
recently, Brad D. Brian, Chair of the American Bar Association Section on Litigation, spoke of
the effect that the departure of the lawyer from service to the community has had on their
standing in the community. 133 Brian stated:

“In the past, townspeople looked to lawyers in the community for leadership and judgment on
important issues. When someone asked, ‘What’s your occupation,’ and the answer was, ‘I’m a
lawyer,’ it was spoken with pride and usually generated instant respect…[w]hen someone now
asks their occupation, many lawyers are almost defensive. They drop their voices or even lower
their eyes. They confess to being a lawyer, as if they are embarrassed or ashamed…[l]eaders
within [the legal] profession need to inspire [other lawyers] and [their] colleagues to devote more
time to serving our communities. [L]awyers are uniquely equipped to help with community
problems – a responsibility that, if fulfilled, will bring greater respect to the profession as a
whole…” 134

Brian punctuated his remarks by stating that, “If lawyers can not take back their historic roles as
leaders in their community, then they deserve to hang their heads when asked what they do.” 135
Because of the level of debt that law students incur while matriculating through law school has
reached historic heights, assuring the service to the community sought by U.C. Davis will only
come through mandate. Rather than discarding the argument for a “leadership/service” rationale

131 Id.
132 David Wilkins, Doing Well By Doing Good – The role of public service in the careers of Black Corporate
lawyers, 41 Hous. L. Rev. 1, 4
133 Brad D. Brian, Lawyers as Public Servants - Litigation Fall 2005, Volume 32 Number 1 (The Journal of the
Section of Litigation) pgs. 1, 2 & 65
134 Id.
135 Id.
for fear that affirmative action will not assure service to the African-American community, service to the community must be mandated. The most effective means to assure the programs effectiveness would be to require that attorneys who benefit from affirmative action serve the community in some capacity or, “Opt-Out” of the race based, “plus” granted during the law school admissions process.

**III. A New Direction: Back to Basics**

As a former President of BLSA at an elite law school, I have witnessed first hand the divide within the blacks attending elite institutions. The debate is one of who is truly a social engineer, that person who is working for a non-profit or a government agency, or that person who takes a job at a prestigious law firm. The correct answer is neither or both. Charles Hamilton Houston, considered by many to be the father or architect to the civil rights movement stated that “A lawyer's either a social engineer or . . . a parasite on society . . . A social engineer [is] a highly skilled, perceptive, sensitive lawyer who [understands] the Constitution of the United States and [knows] how to explore its uses in the solving of problems of local communities and in bettering conditions of the underprivileged citizens.”\(^{136}\) Within this statement there is no mandate that a social engineer completely disassociate themselves from economic gain, but simply that they be committed to bettering others and something must be done now to stop the trend away from service.\(^{137}\)

**Affirmative Action – Leadership/Service & the Opt-Out System**

The focus of a revised system of affirmative action should be to maintain the diverse student body at law schools (elite institutions in particular) while seeking African-American

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\(^{137}\) Greg Winter, Legal Firms Cutting Back on Free Services for Poor, N.Y. Times, Aug. 17, 2000, at A1 (linking the increase in billable hours after 1992 to declines in pro bono work).
students for enrollment who are most likely to serve disadvantaged and underserved communities. One method of assuring that students with a commitment to serve these communities are admitted is to couple affirmative action with an altered tuition and require those students who receive affirmative action to serve disadvantaged communities for a predetermined period of time. This section of the essay first analyzes the perception that the law school admissions process is Meritocratic in nature and discusses the effect that this belief has on African-Americans. It then moves on to present a revised affirmative action system which would require recipients of affirmative action to serve disadvantaged and underserved communities or, “Opt-Out” of the race based “plus” factor currently given in connection with the affirmative action program.

**Affirmative Action and Meritocracy**

The need for a revision to the system of affirmative action is firmly rooted in the fact that many of the current recipients falsely believe that law school admissions process is based on a Meritocracy as it pertains to them. The term Meritocracy, was first used, in a pejorative sense, in Michael Young's 1958 book *Rise of the Meritocracy*, which is set in a dystopian future in which one's social place is determined by IQ plus effort using the formula, \( I + E = M \).\(^{138}\) Though this term was meant by Michael Young to have a negative connotation, the current belief is that there is true value in this system.\(^{139}\) Proponents advance the meritocratic system under the belief that it is just and productive and reduces the distinction caused by race and gender. It is under this guise that many African-Americans approach law school. While they certainly understand that based on conventional standards, in many instances they lack the requisite numerical

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statistics needed for admittance into elite law schools, \((I = \text{LSAT scores and undergraduate GPA’s from prestigious institutions})\), many feel that they still have the merit \((M)\) necessary to attend elite law schools because they score highly in effort (overcoming difficult backgrounds to achieve respectable scores, etc.) While a meritocratic society is largely tied to the American dream that anybody can rise to the top with education and hard work, the reality is that it creates a new caste system based on education which is still tied to the wealth.

Blind faith in the legitimacy of meritocratic admissions process has two major defects when applied to African-Americans. The first defect is that in the meritocratic formula \((I + E = M)\), the intelligence factor, disproportionately benefits the rich, because statistically both social class and family income have a strong and positive correlation with test scores. This means that even when attempting to adjust for gender and racial bias, economic disparities which largely correlate with race will still have the effect of maintaining the status quo. While most students believe that the benefit of attending an elite law school far outweighs any stigma, there may be a subset that subscribes to the stigmatic injury theory described by Justice Thomas. The second defect with the meritocracy is that some in mainstream of society believes that the effort factor associated with the meritocratic formula is not a realistic indicator of who should and should not be admitted into elite law school. While meritocracy in academia is a fallacy in itself, the blind belief in its legitimacy and a diminished self-image can be seeds for creating stigma.

The Preamble to the Revised Affirmative Action Program

A revision to the current system of affirmative action would have a direct effect on three groups, African-American students, African-American Communities and law schools. The effect

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141 See Eastland supra note 12.
on law schools would be minimal as the immediate future would see the same number of African-Americans flowing into law schools which would keep their diversity quotient in tact. African-American communities would be impacted because there would be a new flow of intellectuals into their communities in a volume not seen since the civil rights movement. African-American students would be affected by allowing those who wish to avoid the perceived “stigma” of affirmative action the option to opt of the system, while assuring that those who do partake of the fruits of affirmative action repay that debt through service to their communities. The new system would still be known as affirmative action, but those who accept its benefits would have a “Leadership/Service” commitment and those who do not wish to lead or serve, or who simply choose to reject a government handout will be allowed to “Opt-Out” of the system.

The basic premise of the revised affirmative action system is that its recipients will receive admittance into an elite legal institution at a discounted rate in return for service to poor or underserved communities in some capacity. Those who do not wish to commit to serve these communities must “Opt-Out” of the system and forgo the benefits. It is arguable that the African-American students that attend elite law schools receive the largest benefit from affirmative action and therefore it is these students who the system below focuses on, but the system will apply to African-Americans entering all law schools. Because law school’s admissions offices purport to operate in a meritocratic system, the $I + E = M$ formula is the best way to determine how groups will develop regarding the program.

*The System*

The revised system for affirmative action would be a hybrid of the Army/Navy/Air Force/Marine Corps College Funds and Teach for America. The Army, Navy, Air Force and Marine Corps award college funds on a competitive basis according to academic merit (i.e.,
scoring in the top half of the Armed Services Vocational Aptitude Battery). To qualify one must also agree to serve six years.\textsuperscript{142} Teach for America is an organization that seeks to, “eliminate educational inequity, using research of what distinguishes the most dramatically successful teachers in low-income communities as the framework for the programs components. The organization studies the common characteristics of those teachers who, despite the massive challenges that their students face, overcome every obstacle to lead their students to wholly different life prospects through significant academic achievement.”\textsuperscript{143} Teach for America has the effect of placing, “highly successful teachers in low-income communities established [to] work toward a big goal that many would believe to be unreasonable; invest and motivate others to work hard toward the goal; work purposefully and relentlessly to achieve the goal; and deliberately improve performance over time through constant self-evaluation and learning.”\textsuperscript{144}

The combination of these programs would require African American law school applicants to make a decision about whether they wish to participate in the affirmative action program. The benefit of affirmative action would not only entail reduced admittance standards into elite law schools, but also a reduction in the cost to attend these elite law schools. The decision to receive these benefits also comes with commitments during matriculation and after graduation. During law school, those that choose to participate in the affirmative action programs will not only gain an enhanced chance of entering an elite law school, but will also learn an enhanced curriculum upon acceptance. While the core of their courses will remain similar to those of their peers, affirmative action recipients would be required to take courses such as Poverty Law, Race and Law, Civil Rights Litigation, Social Movements, Human Rights Law, Alternative Dispute Resolution, Ethics in Public Lawyering as well as interdisciplinary

\textsuperscript{142} Army/Navy/Air Force/Marine Corps College Fund Info at http://www.finaid.org/military/recruiting.phtml
\textsuperscript{143} Teach for America info at http://www.teachforamerica.org/about.html
\textsuperscript{144} Id.
courses in Civil Rights History & Urban Planning & Development. This curriculum is built around helping these young lawyers understand the role that lawyers have historically played in the community and the impact that they can have on the future of the community.

There are also commitments for the affirmative action recipients after law school. Each of these attorneys after graduation will be required to spend three years in service to a disadvantaged community. This service requirement would be fulfilled through a network to be developed within these communities. Therefore, post graduation they would easily find service in the community near their job destination, assuming they choose not to serve the community full time. While it would be wonderful if the curriculum spurred these law students to consider full time jobs in the public service sector, the network will be developed with the understanding that the majority of law students at elite schools matriculate into law firms. Therefore the service for the affirmative action graduate would range from serving on local boards, becoming active in civic associations, mentoring youth at local recreation centers, providing economic workshops and street law clinics and participating in a host of other predetermined activities in the community. It is important for these attorneys to become connected to the community, even if it is on a part time basis. An additional focus would be placed on programs targeted at increasing the academic status of black youth by developing community based SAT and LSAT prep programs as well as critical reading workshops. Those that choose not to participate in the program would simply “Opt-Out” and be judged by the meritocratic standard.

*The Goal*

The ultimate goal of the revised affirmative action system would be to establish a body of African-Americans that will be dedicated to serving their community. It is important to articulate that while this program is described through the lens of a law school of which I am
most familiar, for this program to be truly socially transformative, it must be implemented throughout higher education. This is done in the hope that the effects of slavery and Jim Crow will begin to diminish as the community has more interaction with these intellectuals with racial and ethnic similarities.

The concept of the lawyer in particular as a dedicated servant is not new, but it has diminished to the point now that mandating service may be the only way to assure its continuation. This mandate would work by requiring the beneficiaries of affirmative action to become “social engineers”. Charles Hamilton Houston laid out The Five Obligations of the, “social engineer,” and these would be the creed of all who benefit from affirmative action. The “social engineer,” must take an oath;

(1) To be prepared to anticipate, guide and interpret group advancement; (2) To be the mouthpiece of the weak and a sentinel guarding against wrong; (3) To ensure that the course of change is orderly with a minimum of human loss and suffering, guid[ing] … antagonistic and group forces into channels where they would not clash; (4) To recognize that the written constitution and inertia against its amendment give lawyers room for social experimentation and therefore, to use … the law as an instrument available to [the minority] unable to adopt direct action to achieve its place in the community and nation; and (5) To engage in a carefully planned [program] to secure decisions, rulings and public opinion on…broad principle[s] while arousing and strengthening the local will to struggle.145

The main problem of the current system is that it does not adequately remedy the societal ills that create a class of African-Americans that fail to compete for seats in first year classes at elite institutions. While this is a societal issue, Government intervention is more easily gained when those that benefit from social programs take the initiative. As Goodwin Liu notes, part of the problem in the community is that impoverished African-Americans do not develop a belief that they can achieve professional degrees because it is not immediately tangible to them.146 By requiring African-Americans to serve disadvantaged communities in some capacity, particularly the mentoring of youth, these youth can be reached at a younger age in an effort to bridge the

145 See McNeil supra note 141.
146 Goodwin Liu, Brown, Bollinger, and Beyond, 47 How. L.J. 705 (Spring 2004).
academic gap. Additionally, David Wilkins has written about how this propensity to serve can actually help the young African-American lawyer in the long run by helping them to cultivate an external persona. He argues that African-American lawyers gain the benefit of experience, visibility, and contacts from working in the community which is vital to building their corporate practice.

IV. Critiquing the System

The plan I have presented for affirmative action is straightforward, however I believe there are the major critique of the opt-out system is that though it allows students to opt-out of the affirmative action program, it does not sufficiently address the issues of stigma associated with any affirmative action program. In the system, there will be no significant way to distinguish between those that opt in and opt out of this system. This critique stems from the dissent offered by Justice Clarence Thomas in Grutter. The problem as Thomas sees it is that there is a stigmatizing effect because with the advent of affirmative action, “Who can differentiate between those who belong and those who do not?” “When the majority of blacks are admitted because of affirmative action,” Thomas wrote, “all are tarred as undeserving.” He argues that the, “problem of stigma does not depend on the determinacy as to whether those stigmatized are actually the ‘beneficiaries’ of racial discrimination. When blacks take positions in the highest places of government, industry or academia, it is an open question today whether their skin color played a part in their advancement.”

It is Thomas’s contention that this very system, meant to benefit African Americans is instead causing them a “positive harm”. While

147 See Wilkins supra note 137.
148 Id.
149 See Grutter supra note 6 at 373 (Thomas, J., concurring in part and dissenting in part).
150 Id.
151 Id. at 379.
152 Id. at 379.
Thomas’ argument was met with immediate backlash,\(^{153}\) it is one that with the aid of data could have legal merit. However I offer two defenses to the stigmatic injury theory advanced by Thomas; first his jurisprudence and the inconsistency between his message and his actions shed doubt on the substantive or historical grounding of his arguments, second he fails to consider the stigmatizing effects of integration balanced against the stigmatizing effect of having none or very few blacks at elite institutions.

Clarence Thomas’s arguments for stigmatic injury are flawed because they lack substantive or historical grounding. In his Open Letter to Clarence Thomas\(^ {154}\) Judge Higginbotham systematically provided historical perspective to many of Thomas’ ideologies exposing many of them as meritless. Like Thomas, Higginbotham arose from humble beginnings,\(^ {155}\) matriculated through Yale Law and quickly climbed the ranks of federal government.\(^ {156}\) It is this common background which adds credence to his critique.

Higginbotham’s major critique of Thomas is that it is difficult to believe that his policies, such as his stance on affirmative action or truly couched in a dialogue meant to benefit blacks African Americans when his jurisprudence is often harmful to this group.\(^ {157}\) Furthermore, Higginbotham

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\(^{153}\) See, e.g., Maureen Dowd, Editorial, Could Thomas Be Right?, N.Y. Times, June 25, 2003, at A25 ("[Thomas] knew that he could not make a powerful legal argument against racial preferences, given the fact that he got into Yale Law School and got picked for the Supreme Court thanks to his race. So he made a powerful psychological argument ... The dissent is a clinical study of a man who has been driven barking mad by the beneficial treatment he has received.")


\(^{156}\) Id.; see also A. Leon Higginbotham Jr., AN OPEN LETTER TO JUSTICE CLARENCE THOMAS FROM A FEDERAL JUDICIAL COLLEAGUE, 140 U. Pa. L. Rev. 1005 (1992)

distinguished Thomas from the former Justice Thurgood Marshall arguing that unlike Thomas, Marshall had a judicial philosophy, “grounded in history” and “driven by the knowledge that even today, for millions of Americans, there still remain “‘hopes not realized and promises not fulfilled.’”

Higginbotham also critiqued Thomas for his disdain for civil rights advocates with Thomas being quoted as saying that rather then establishing substantive dialogue with the administration choose to, “bitch, bitch, bitch, moan and moan, whine and whine.” Additionally Judge Higginbotham offers a stinging critique of Thomas’s judicial alliances within the court because the majority of the justices were the beneficiaries of a privileged life having never suffered acute deprivations of poverty devoid for a portion of meaningful contact with women and African Americans.

While Professor Stephen Smith and others believe that ultimately Justice Thomas should be allowed to issue jurisprudence without racial constraints and without providing historical context, many of Thomas positions are weakened because of this very point. Ultimately, Thomas can not offer stigma as a legitimate critique to affirmative action.
when he has a limited understanding of the program and its historical context and offers no evidence of stigma other than his own experience.

While Justice Thomas’s argument that affirmative action causes African Americans stigmatic harm is greatly damaged by his ideology and jurisprudence, this does not totally exclude the fact that there may be a segment of the race that does subscribe to this ideology. Thomas has obviously drawn on his own personal experience in offering his stigmatic injury theory, however the problems that he attributes to affirmative action are actually remnants from integration causing nihilistic beliefs in self worth. Thomas as many others did in the deep south faced the arduous task of being the only black in the class during high school while in seminary in Kansas City and was one of very few while obtaining his degree from Holy Cross and experienced racism overtly and covertly throughout his matriculation.

Justice Thomas would enter Yale Law School just as affirmative action had reached their admissions office and it was this fact combined with his confused social and political being that would serve as the genesis of his stigmatic harm argument. Thomas at this point did not have a strong enough self image to realize that the arguments being leveled at him were the same that he had been hearing all his life, but were now being veiled as affirmative action quips. He had been at or near the top of his class his entire academic career in schools where he was often less than


163 See Ken Fosket, Judging Thomas 53 (2004); see also Andrew Peyton Thomas, CLARENCE THOMAS: A BIOGRAPHY 53-56 (2001). - As a teenager during the process of desegregation, Justice Thomas, an outstanding student by all accounts began tenth grade at Saint John Vianney Minor Seminary, an all white boarding school. While at St. John, Thomas dealt with the extreme burden of his race where he was tormented because of his skin color and not is academic prowess.
164 Id. – While Justice Thomas is the product of affirmative action, this was not always the case. Thomas would complete his studies at St. John’s and would enroll in Immaculate Conception Seminary in Kansas City, Missouri. Thomas again excelled academically, but was once again met by extreme racism. Thomas would reach his breaking point when after the assignation of Martin Luther King Jr. he heard a white classmate remark, “Good, I hope the S.O.B. dies.” Thomas would leave in the midst of this racism.
165 Id.
1% of the population, but this reality dissipated when his white colleagues attacked him because he had such low internal self esteem. Upon hearing the white liberal critique, he felt as if he had to prove his intellectual ability and personal worth everyday by virtue of his black skin.\textsuperscript{166}

The stigmatic injury suffered by Clarence Thomas and those who he purports to represent is not result of affirmative action and the insults provided externally by white colleagues, but rather the internal war for an identity within. As Thomas was struggling for an identity while matriculating through Yale, Harold Cruse was documenting the struggles that burgeoning black intellectuals were confronting.\textsuperscript{167} Cruse wrote:

\begin{quote}
"The peculiarities of the American social structure, and the position of the intellecction class within it, make the functional role of the negro intellectual a special one. The negro intellectual must deal intimately with the White power structure and cultural apparatus, and the inner realities of the Black world at one and the same time. But in order to function successfully in this role, he has to be acutely aware of the nature of the American social dynamic and how it monitors the ingredients of class stratifications in American society…Therefore the functional role of the negro intellectual demands that he cannot be absolutely separated from either the Black or the White world."
\end{quote}

Dr. Cornell West, a Professor of Theology and Politics has addressed the issues that blacks such as Thomas face by dividing the various schools of ideology into four categories, The Marxist Model, The Fougahtian Model, Insurgency Model and the The Bourgeois Model.\textsuperscript{169} West sees the problem with the black intellectual stemming from an internal tension to discover ones path, and while it is influenced by external pressure, it is ultimately a personal decision.\textsuperscript{170} The model of ideology most applicable to the “stigmatically injured” is the Bourgeois Model.

The Bourgeois Model of black intellectual thought requires one to become entrenched in conventional academia. While this system pervades American Academic institutions, it is only credible for African Americans who possess, “sufficient legitimacy and placement.”\textsuperscript{171}

\begin{flushleft}
\textsuperscript{166} Id. \\
\textsuperscript{167} Harold Cruse, \textit{The Crisis of the Negro Intellectual} (1967) \\
\textsuperscript{168} Id. \\
\textsuperscript{169} Cornel West, \textit{The Cornel West Reader}, 302 -315 (New York, Basic Civitas Books, 1999) \\
\textsuperscript{170} Id. at 308 \\
\textsuperscript{171} Id.
\end{flushleft}
theory, the benefit of this model is that it gives African-Americans access to select networks and provides the contacts necessary to provide substantive impact on public policies.\footnote{Id.} In practice, the theory fails because while it does address the issue of the “meritless” African-American intellectual, when peeled back it reveals that the true motive for the animosity towards the “stigmatically injured” could very well be race. The affirmative action debate allows the same students that ridiculed Thomas before the advent of affirmative action to continue this ridicule, only now it is veiled and legitimated under the guise of seeking to respect the rights of the majority.

In addition to truly analyzing the basis for the mental anguish experienced by the stigmatically injured, Thomas also fails to articulate the other spectrum, more specifically the stigma caused by only one or very few African Americans reaching elite law schools. If Clarence Thomas is to present himself as the model of those stigmatically injured by affirmative action, then renowned attorney and legal scholar Derrick Bell, can most assuredly be offered as his antithesis. By the time Derrick Bell arrived at Stanford Law as a visiting professor in 1986, he had served as a Lecturer at Harvard Law (1969), a Professor of Law at Harvard Law (1971), a Professor of Law at the University of Oregon School of Law (1981), Dean of the University of Oregon School of Law, (1981-1985) and again a Professor of Law at Harvard Law (1986), not to mention the many books he had written.\footnote{Derrick Bell Biography available at http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=cv.main&personID=19776} However, all of Bell’s credentials were insufficient to help him escape the taint of racism that he would face at Stanford Law. In 1986 while serving as a visiting professor at Stanford Law, white students and professors, dissatisfied with his

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\footnote{Id.}

\footnote{Derrick Bell Biography available at http://its.law.nyu.edu/faculty/profiles/index.cfm?fuseaction=cv.main&personID=19776}
performance as a teacher, created a remedial series of lectures to supplement his course on constitutional law.  

Randall L. Kennedy, a current professor at Harvard Law argues “That this affront was inflicted upon a prominent black scholar at a top tier law school prompts concern about the fate of lesser-known black scholars at less-visible institutions.”

Kennedy emphasized his point by noting that, “scholars of color at a broad range of institutions constantly face race-related difficulties in routine encounters with white colleagues, administrators, and students.”

What Thomas and the “stigmatically injured” fail to realize is that the resentment

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174 See Randall L. Kennedy, RACIAL CRITIQUES OF LEGAL ACADEMIA, 102 Harv. L. Rev. 1745 (1989) - Paul Brest, the current Dean at Stanford Law School, succinctly states the essential facts:

In the Spring of 1986, Derrick Bell was a visitor at Stanford Law School, where he taught an introductory course in Constitutional Law. Professor Bell was the former Dean of the University of Oregon Law School, and he teaches at Harvard Law School. He is a prominent legal scholar. He is also Black.

Students in Professor Bell's class criticized his teaching and complained that they were unable to learn the subject from him. Many began auditing other instructors' constitutional law classes. These events ultimately led to the idea of a series of public lectures in basic constitutional law to be given by various faculty members. Although these lectures would be open to the student body as a whole, their unstated purpose was to offer Professor Bell's students a supplement to his course. The series was called off after members of the Black Law Students Association protested the first lecture on the ground that both the students' dissatisfaction and the unprecedented lecture series were tainted by racism.

Statement of Dean Paul Brest, [Stanford] Campus Report, Dec. 2, 1987, at 15, reproduced in D. Bell, Stanford Law School Follow-Up (unpublished memorandum) (on file at the Harvard Law School Library). Along with other members of the Stanford Law School Faculty and Administration, Brest has expressed regret over the occurrence of this ugly incident and has apologized for it. See id.

For Derrick Bell's poignant account of this episode, see Bell, The Price and Pain of Racial Perspective, Stan. L. Sch. J., May 9, 1986, at 5. Describing his own reaction to the snub inflicted upon him, Bell wrote:

I find myself remembering with feelings approaching fondness the occasional Southern judge, who, to insure that I did not miss his disdain for both my competence and my cause, swiveled his chair and faced the wall when I approached the bench to argue a civil rights case. Back then, the racial hostility was patent and the insult expected. [By contrast] I accepted the invitation to visit Stanford as something of a reward for a decade and a half of 'proving myself worthy' to teach at a prestigious school. . . . As a guest welcomed with smiles at the door, I must confess that I simply was not prepared for what happened after I thought myself safe among friends.

Id.

that they argue belongs at the feet of affirmative action, could easily belongs to a much more deep rooted hatred. Even if affirmative action is used to help minorities enter law school, once there, they are graded solely on a meritocratic scale, so therefore those in academia have traversed the same battlefields as their white colleagues. Yet they still find themselves in entrenched in the same debates about their intelligence and value which completely contradicts Thomas and his bourgeois model of academic ascendancy.

Justice Thomas’s stigmatic injury theory deserves serious critique because his jurisprudence and the inconsistency between his message and his actions shed doubt on the substantive and historical grounding of his arguments and because he fails to consider the stigmatizing effects of integration balanced against the stigmatizing effect of having none or very few blacks at elite institutions. My opt out program is geared toward having a generation of law students plugged into the community with the goal of spurring generation growth in youth through academic programs and engaging the community politically and civically. The belief is that helping these students matriculate through elite institutions and reconnect with the community will be socially transformative.

Conclusion

In an editorial from his newspaper, the North Star, Frederick Douglass wrote,

“It is neither a reflection on the fidelity, nor a disparagement of the ability of our friends and fellow-laborers to assert what “common sense confirms and only folly denies,” that the man who has suffered the wrong is the man to demand redress, - that the man STRUCK is the man to CRY OUT – and that he who has endured the cruel pangs of slavery is the man to advocate Liberty. It is evident we must be our own representatives and advocates – not exclusively, but peculiarly – not distinct from, but in connection with our white friends. In the grand struggle for liberty and equality now waging it is meet, right and essential that there should arise in our ranks authors and editors, as well as orators, for it is in these capacities that the most permanent good can be rendered to our cause…”

177 Hebert Aptheker, A Documentary History of the Negro People in the United States 255-56 (New York: Citadel Press, 1951)
Frederick Douglass was a lifelong advocate of service to the African-American community by African-Americans. He advocated that African-Americans should take the forefront in uplifting their race even if Caucasians were unwilling to help. But, affirmative action is evidence of Caucasians willingness to help and with the Supreme Court’s decision in Grutter affirmative action has been entrenched in our society for at least another 25 years. The program has had the effect of placing African-Americans in positions of leadership that may have never been available if not for the connection to the elite law schools. However ultimately, affirmative action has not led to the overall upliftment of the race. The diversity model overemphasizes the benefits of African-Americans working with Caucasians and underemphasizes the need for African-Americans to serve their community.

The Opt-Out system seeks to reward those African-American who are willing to commit to serving underprivileged communities with the opportunities to attend an elite law school. It is through this system that the original intent of affirmative action can be achieved. There will continue to be a diverse student body, however, the African-Americans that choose not to, “Opt-Out” of affirmative action will truly comprise the future leaders and footsoldiers of disadvantaged communities, as they will be forced to exhibit their commitment to the community. It is through this revamped system of affirmative action that true self-sufficiency can be fostered as African-Americans serve their communities helping to rid them of illiteracy, providing role-models, and holding SAT and LSAT Prep Courses. Execution of this revised program will result in Justice O’Connor’s mandate of only 25 more years of affirmative action serving merely as a timeline for completion of a goal rather than a death sentence for African-American’s admittance into elite institutions.