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### Taking Educational Caste Seriously: Why Grutter Will Help Very Little From Brown to Grutter: Affirmative Action and Higher Education in the South

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# Taking Educational Caste Seriously: Why *Grutter* Will Help Very Little

Bryan K. Fair\*

*Why do children of different races perform differently on standardized tests in reading and math? Is there a biological explanation? Are some races intellectually superior? Are slavery, segregation, and discrimination in educational opportunities relevant to current disparities? Are the disparities statistically significant? Should those with the highest scores receive the best educational opportunities? Is affirmative action a legitimate remedy for past educational discrimination?*

*Fifty years after the decision in *Brown v. Board of Education*, educational equity remains elusive for many Americans with darker skin. Some commentators lament the racial resegregation of public schools. Others note the large resource disparities between schools for the rich and schools for most Americans.*

*The nation's very best universities are all but closed to minorities, and it is unlikely that *Grutter v. Bollinger* will alter this historic pattern. *Grutter* rests on an antidiscrimination theory of equality that renders cumulative educational disadvantage invisible. It ignores educational caste. It imposes on government no duty to dismantle educational caste. The Court must adopt an anticaste equality principle to realize the promise of the Equal Protection Clause.*

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## I. INTRODUCTION

Justice Oliver Wendell Holmes, Jr., once noted that “a page of history is worth a volume of logic.”<sup>1</sup> That aphorism seems quite apt to

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\* Thomas E. Skinner Professor of Law, The University of Alabama School of Law. J.D., UCLA School of Law, 1985; B.A., Duke University, 1982. I wish to thank the students on the *Tulane Law Review* for the opportunity to attend the outstanding symposium on *Grutter v. Bollinger*. I also appreciate the excellent work of other presenters who provided me deeper insights into the theoretical issues presented in *Grutter's* wake. As always, I thank my extraordinary colleagues at the University of Alabama School of Law for their continuing support. I thank Dean Ken Randall for his decade of extraordinary leadership and support. I am also in debt to the Law School Foundation and our generous alumni for summer research support, to Tony Bell and Katie Hammett for research assistance, and to Patty Lovelady Nelson for thirteen years of dedicated service.

1. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

the elusive quest for educational equality in the United States.<sup>2</sup> Despite constitutional promises to the contrary, “we the people” has had a most limited scope of protection, leaving many Americans living in legally constructed, subjugated castes.<sup>3</sup>

One significant form of caste in the United States is racial caste. Various colored people have demanded equality from ruling elites in what is now the United States of America during the past six centuries.<sup>4</sup> History’s answer has been a resounding, repeated “no” to Native American Indians, Mexican-Americans and other Latinos, Asian-Americans and Pacific Islanders, African-Americans, and other indigenous people with darker skin; to women of every hue; and to others who experience only a different degree of caste.<sup>5</sup> Ruling racial elites rationalized their hegemony through combinations of Social Darwinism: darker, inferior, mixed-race people, living without Christianity’s light, were unfit to maximize the use or productivity of vast areas of land and valuable resources; they also could never be

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2. There are many causes of inequality. Some people make poor decisions, like having children too young or using drugs. Others do not work as hard as they might or do not take advantage of every opportunity available. Many commentators overstate these causes. I will not. For me, such factors do not explain caste in the United States. I use caste to describe the political, economic, and social structures that exclude many persons in the United States from equal opportunities. To paraphrase a political cartoon I once read, some Americans are simply the wrong race, the wrong gender, the wrong sexual orientation, the wrong religion, or wrong in some other arbitrarily defined way. They are subjugated and exploited, with little chance of escaping their marginalized status. I find an explanation for caste in the United States in the tragic history of this country. Caste is the legacy of unequal laws and customs throughout the United States, extending the best subsidized benefits to some and relegating others to inferior resources or none at all. See *generally* DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* (4th ed. 2000); DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* (1987); RICHARD DELGADO, *THE RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE* (1995); JUAN F. PEREA ET AL., *RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA* (2000). I rarely agree with Abigail and Stephan Thernstrom, but I do agree that there is no excuse for the racial performance gap on standardized tests. Again, I think differently than the Thernstroms about the causes, and I am often surprised the gap is not larger. A gap of thirty to thirty-five points does not justify the substantial exclusion of students of color from the best schools in the United States. Likewise, a ten point gap on the LSAT does not justify the domination of whites in U.S. law schools. There is no excuse for educational caste. See ABIGAIL THERNSTROM & STEPHAN THERNSTROM, *NO EXCUSES: CLOSING THE RACIAL GAP IN LEARNING 2* (2003).

3. See BRYAN K. FAIR, *NOTES OF A RACIAL CASTE BABY: COLORBLINDNESS AND THE END OF AFFIRMATIVE ACTION 172-73* (1997) [hereinafter FAIR, *NOTES OF A RACIAL CASTE BABY*]; Bryan K. Fair, *The Anatomy of American Caste*, 18 ST. LOUIS U. PUB. L. REV. 381, 385 (1999) [hereinafter Fair, *Anatomy of American Caste*].

4. I have previously articulated a Declaration Against Caste. See Fair, *Anatomy of American Caste*, *supra* note 3, at 384-89.

5. PEREA ET AL., *supra* note 2, at 231-60, 326-55, 367-84, 399-412.

social or political equals to whites, belonging substantively as equal citizens in a white country.<sup>6</sup>

Logic, then, would suggest that colored people in the United States cannot look to ruling white elites to define the scope and meaning of equality. Rulers will not adopt an interpretive theory of equality, forcing themselves to disgorge their unjust privileges. Structural and ideological racism are too ensconced, and, for most whites, their cumulative racial privileges are masked and invisible; the notion of white racial privilege confounds them.<sup>7</sup>

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6. *Id.*

7. BARBARA J. FLAGG, *WAS BLIND, BUT NOW I SEE: WHITE RACE CONSCIOUSNESS & THE LAW* 18 (1998); PEGGY MCINTOSH, *WHITE PRIVILEGE AND MALE PRIVILEGE: A PERSONAL ACCOUNT OF COMING TO SEE CORRESPONDENCES THROUGH WORK IN WOMEN'S STUDIES* 1-5 (Wellesley Coll. Ctr. for Research on Women, Working Paper No. 189, 1988); STEPHANIE M. WILDMAN, *PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA* 45 (1996). Peggy McIntosh suggests many examples of white privilege:

1. I can if I wish arrange to be in the company of people of my race most of the time.

....

3. If I should need to move, I can be pretty sure renting or purchasing housing in an area which I can afford and in which I would want to live.

4. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.

5. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

6. I can turn on the television or open to the front page of the paper and see people of my race widely represented.

7. When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is.

8. I can be sure that my children will be given curricular materials that testify to the existence of their race.

9. If I want to, I can be pretty sure of finding a publisher for this piece on white privilege.

....

12. I can go into a music shop and count on finding the music of my race represented, into a supermarket and find the staple foods which fit with my cultural traditions, into a hairdresser's shop and find someone who can cut my hair.

13. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.

14. I can arrange to protect my children most of the time from people who might not like them.

....

18. I can swear, or dress in second hand clothes, or not answer letters, without having people attribute these choices to the bad morals, the poverty, or the illiteracy of my race.

19. I can speak in public to a powerful male group without putting my race on trial.

20. I can do well in a challenging situation without being called a credit to my race.

21. I am never asked to speak for all the people of my racial group.

Unlike Barbara Flagg, Stephanie Wildman, and Peggy McIntosh, most whites never think about whiteness, white supremacy, or how one becomes white. For many whites, their race does not matter. They are normal. Most know they can go any place, live any place, or work any place. Their race is not a subject, unless it is discussed to mark what they are not. They are not *tainted* by darker, indigenous blood. "This land is your land" rings truest for them!

Yet, if one reads the equality principle as countermajoritarian, requiring racial elites to dismantle systemic or structural burdens on subjugated castes, whatever the basis of their creation, society could be transformed and white supremacy's legacy could end. But, that, of course, is the road not taken. Instead, the United States Supreme Court's antidiscrimination jurisprudence impedes the elimination of all caste, shielding cumulative disadvantage from substantive legal reform and preserving racial supremacy.<sup>8</sup>

This history of cumulative disadvantage is applicable to educational equity as well. We who seek substantive educational equity to reverse caste must acknowledge the traditional refusal of

22. I can remain oblivious of the language and customs of persons of color who constitute the world's majority without feeling in my culture any penalty for such oblivion.

23. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.

24. I can be pretty sure that if I ask to talk to "the person in charge," I will be facing a person of my race.

25. If a traffic cop pulls me over or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

26. I can easily buy posters, post-cards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.

27. I can go home from most meetings of organizations I belong to feeling somewhat tied in, rather than isolated, out-of-place, outnumbered, unheard, held at a distance, or feared.

....

35. I can take a job with an affirmative action employer without having co-workers on the job suspect that I got it because of race.

36. If my day, week, or year is going badly, I need not ask of each negative episode or situation whether it has racial overtones.

....

40. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.

41. I can be sure that if I need legal or medical help, my race will not work against me.

....

46. I can choose blemish cover or bandages in "flesh" color and have them more or less match my skin.

MCINTOSH, *supra*, at 5-9.

8. FAIR, NOTES OF A RACIAL CASTE BABY, *supra* note 3, at 172-75.

ruling whites to extend educationally effective schools to colored people. The consequences of that refusal are extant. We not only have segregated education but also performance disparities in basic reading and math skills.<sup>9</sup> Today, those test score disparities are used to allocate superior educational resources primarily to wealthier whites. That is unfair and should be unconstitutional.

The purpose of this Essay is to explain why, at the end of the day, *Grutter v. Bollinger*,<sup>10</sup> too, may be of quite limited effect. It rests on many of the same unstated premises and assumptions that keep cumulative educational disadvantage beyond reform. Government can take some limited account of race.<sup>11</sup> Race can be a factor in admissions decisions.<sup>12</sup> But government cannot go too far, trammeling the rights of innocent whites, and government cannot use race for too long.<sup>13</sup>

Yet, if there are real educational benefits to diversity, why can't government seek to achieve it indefinitely? And why can't government seek 100% diversity admits? Why is it limited to some arbitrary, critical mass of students of color?<sup>14</sup> Why are ruling whites entitled to disproportionate shares of the best educational opportunities in the United States? The answer cannot be that it has always been that way, and it cannot be that whites are intellectually superior and thus more deserving. Ruling whites have been the favored children; they have improved their lot through special benefits. Regrettably, Justice O'Connor's opinion for the Court does not acknowledge the historical advantages enjoyed by ruling whites. As a consequence, she renders their racial privileges invisible and white plaintiffs as innocent victims. To put it mildly, Justice O'Connor's reasoning in *Grutter* appears on a collision course with itself.

In Part II, I recall *Brown*, *Bakke*, and *Fordice*, explaining my concern regarding lingering white educational hegemony.<sup>15</sup> Educational apartheid in the United States appears intractable. Any proposed reform that leaves in place or that extends cumulative educational advantages for whites and which locks out most students of color is not a solution at all. In Part III, I challenge the viewpoint that test scores are the most just basis for selecting applicants and the

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9. THERNSTROM & THERNSTROM, *supra* note 2, at 12-23.

10. 539 U.S. 306 (2003).

11. *Id.* at 322-24.

12. *Id.* at 324-26.

13. *Id.* at 326-43.

14. *Id.* at 328-30.

15. *See infra* notes 40-61 and accompanying text.

perspective that applicants with higher scores are better qualified and more deserving than those with lower scores.<sup>16</sup> In Part IV, I explain why neither colored nor white students will be winners under *Grutter*, illustrating how the Court loses greater legitimacy when it applies a legal theory that presumes white entitlement and privilege and adopts a holding that preserves white hegemony.<sup>17</sup> In Part V, I conclude by proposing to substitute the antidiscrimination principle with the more generative anticaste theory of equality, an equal protection policy that imposes on the government an affirmative duty to eliminate every aspect of educational caste, root and branch.<sup>18</sup> Only after the government eliminates the performance and attainment disparities that it helped create will it be possible to talk about judging persons based on the content of their character, rather than the color of their skin.

## II. THE LEGACY OF *BROWN*, *BAKKE*, AND *FORDIICE*

As we celebrate the fiftieth anniversary of *Brown v. Board of Education*<sup>19</sup> and acknowledge the twenty-fifth memorial of *Regents of the University of California v. Bakke*,<sup>20</sup> I see reason for limited celebration but also grave concern. On the one hand, the glass is certainly more full than before. We can proudly commemorate the passing of the government's Jim Crow policies, noting the Herculean accomplishments of the National Association for the Advancement of Colored People through Charles Houston, Walter White, Thurgood Marshall, and that exceptional cadre of courageous lawyers, historians, and social scientists who stared down overt white supremacy and exclusion.<sup>21</sup> Our nation is better for their lives and work. They had the temerity to believe that the American Creed of equal educational opportunity was vacuous so long as, by law or custom, it was denied to Americans with darker skin.<sup>22</sup>

On the other hand, there is an emptiness, a longing for so much more reform. One cannot miss the fact that legal remedies in *Brown*

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16. See *infra* notes 41-56 and accompanying text.

17. See *infra* notes 56-76 and accompanying text.

18. See *infra* notes 77-83 and accompanying text.

19. 347 U.S. 483 (1954).

20. 438 U.S. 265 (1978).

21. See JACK GREENBERG, *CRUSADERS IN THE COURTS* (1994); CONSTANCE BAKER MOTLEY, *EQUAL JUSTICE UNDER LAW* 70-125 (1998); U.W. Clemon & Bryan K. Fair, *Lawyers, Civil Disobedience, and Equality in the Twenty-First Century: Lessons from Two American Heroes*, 54 ALA. L. REV. 959, 960 (2003).

22. A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* 166 (1996).

and its progeny did not dismantle white educational hegemony in the United States. Today, significant numbers of the nation's schoolhouses remain substantially one race, from elementary through graduate school, with whites controlling and consuming a disproportionate share of the very best programs. DuBois' color line has changed in form, but in substance it has dissipated only modestly.<sup>23</sup>

A few schools have experimented with limited diversity admission policies after *Bakke*, adopting inclusive plans like Harvard's.<sup>24</sup> *Bakke* opened extraordinary educational opportunities to me and many others at some select schools.<sup>25</sup> At UCLA School of Law, the Class of 1985, of which I was a member, included approximately forty percent diversity admits.<sup>26</sup> Nearly four hundred of UCLA's one thousand total law students were African-Americans, Asian-Pacific Islanders, Mexican-Americans, or Native American Indians, and economically disadvantaged whites.<sup>27</sup> For many students, it was the most ethnically diverse student body they had ever been in. Consequently, it was an exceptional place to study law.<sup>28</sup>

Yet, *Bakke's* potential for expanding the number of diverse student bodies throughout the country went largely untapped. The vast majority of the nation's colleges and universities never altered their admission policies to enroll significantly more minority students, leaving most colored students at second-tier schools or not in school at all.<sup>29</sup> Few officials saw in *Bakke* a constitutional path to educational integration. Few embraced the possibility to repudiate cumulative educational privilege for whites, suggesting that, despite changes in law, many officials remained committed to educational segregation.

Under *Bakke's* reasoning, every seat at every university might be part of a diversity admission plan to open higher educational opportunity to more Americans.<sup>30</sup> Every applicant could discuss his or

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23. See Appendix A: Largest Public Colleges and Universities in the United States by Enrollment. The demographics of the schools say much about who attends flagship research universities versus second- or third-tier universities. Professor Gary Orfield at Harvard contends that in some states, like Alabama and Louisiana, resegregation in public schools is extant. See Gary Orfield, *A Discussion on Race and Desegregation*, S. J. OF TEACHING & EDUC. (Winter 2004), at <http://www.sjteonline.com/winter2004gorfield.htm>.

24. *Bakke*, 438 U.S. at 316.

25. WILLIAM G. BOWEN & DEREK BOK, *THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS* 8-10 (1998).

26. FAIR, NOTES OF A RACIAL CASTE BABY, *supra* note 3, at 57.

27. *Id.* at 59.

28. *Id.* at 56-60.

29. *Id.* at 164; see also BOWEN & BOK, *supra* note 25, at 9.

30. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 319-20 (1978).

her prior educational opportunities and attainment, family circumstances, and distinct experiences.<sup>31</sup> And every applicant could also describe his or her ethnic or racial experiences, advantages and disadvantages, growing up, in school, or in the community.<sup>32</sup> Such an approach could de-emphasize arbitrary standardized test scores and disparities, which disproportionately exclude poor and/or minority applicants from the best schools.

For all of their possibility, then, *Brown* and *Bakke* did not integrate education or equalize educational opportunity for all Americans. One continuing problem is that some states have not eliminated all vestiges of their de jure or de facto segregated systems. Some schools still sponsor policies that virtually guarantee that they will remain primarily white. They set admissions criteria that presumptively exclude most colored students. They have social systems and housing patterns that, although appearing race neutral, are most receptive to white students. Culturally, their environments are most familiar to whites, with colored students tolerated as outsiders.

This problem was finally addressed by the Court in *United States v. Fordice*.<sup>33</sup> There, the Court found that Mississippi had continued some past practices that could cause its public colleges to remain segregated.<sup>34</sup> The Court made clear that simply adopting race-neutral policies was not sufficient to meet the state's constitutional burden for establishing a unitary school system.<sup>35</sup>

Under *Fordice*, many universities might yet be out of compliance with constitutional obligations, but it appears unlikely that either the federal Office of Civil Rights, state agencies, or any advocacy groups are poised to initiate new *Fordice* lawsuits around the country in federal courts that seem so hostile to extending their supervision over public schools. Moreover, for all the universities that have de facto segregation, the Court still says plaintiffs have the burden of proof to show past segregative acts before school officials must rebut by showing that race-neutral factors have caused the current segregation.<sup>36</sup>

Thus, despite significant opinions from the Court, little in fact has changed over the past fifty years. Colored people primarily still attend colored, second-caste schools—institutions with smaller

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31. *Id.* at 317.

32. *Id.*

33. 505 U.S. 717 (1992).

34. *Id.* at 734.

35. *Id.* at 732-33.

36. *See Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 198 (1973).

budgets, fewer faculty, modest libraries, limited technology, and less adequate facilities.<sup>37</sup> Educational opportunity remains significantly separate and unequal. And many whites believe they are entitled to the best educational opportunities because they, on average, present higher grades and test scores than most colored people. Increasingly, they challenge the constitutionality of admission policies designed to increase the enrollment of colored students.<sup>38</sup> They acknowledge test score disparities, but discount any unfairness or privilege. Colored students presumably are either inferior or they do not work hard enough. Either way, remedial diversity admission policies are considered unfair to whites and supposedly violate the colorblindness principle belatedly embraced by so many whites.<sup>39</sup>

And now we have *Grutter*. As much as I would like to believe that the Court has turned the corner, and as much as I might hope for the elimination of white educational hegemony, I would be less than candid to suggest that I expect *Grutter* to be any more transformative than *Brown*, *Bakke*, or *Fordice*. *Grutter* is conservative. It portends little change in educational access. The Court has opened the schoolhouse door only in the most limited sense, missing yet another opportunity to destabilize a key aspect of white supremacy.

### III. STILL STANDING IN THE SCHOOLHOUSE DOOR

Many people in the United States have either never learned or have forgotten that racial discrimination was a core value in federal and state educational history in the United States. Certainly, growing up in Ohio, I was never taught about the laws excluding colored people from the best public schools. I doubt that most persons have been taught about their state's practices either. Yet, the more one looks, the more one finds extensive racial discrimination in education across the United States, not just the South.<sup>40</sup>

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37. See generally THERNSTROM & THERNSTROM, *supra* note 2 (providing recent analysis of the racial performance gap).

38. See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234 (11th Cir. 2001); *Smith v. Univ. of Wash. Law Sch.*, 233 F.3d 1188 (9th Cir. 2000); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996); *Podberesky v. Kirwan*, 38 F.3d 147 (4th Cir. 1994).

39. For example, the Thernstroms argue: "The racial gap in academic achievement is an educational crisis, but it is also the main source of ongoing inequality." THERNSTROM & THERNSTROM, *supra* note 2, at 1.

40. PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR* 14-15 (Univ. of Ga. Press 1997) (1951).

Any normative assessment of U.S. education policies reveals certain, unmistakable truths. First, local, state, and federal government officials acquiesced in discrimination against colored people by awarding lands for the creation of segregated schools and by allocating grants to schools that excluded colored people solely on the basis of their racial classification.<sup>41</sup> Second, ruling whites and poor whites have regularly blocked equal educational opportunities for colored people by establishing flagship schools open to whites only and ghetto schools for colored people.<sup>42</sup> Even when poor whites rarely had access themselves, they supported segregation based on the promise that, as whites, they would gain access before colored people. Third, even with changes in the law, whites have resisted extending educational benefits to colored people, opting instead to close schools, establish private schools, and to initiate admission policies that effectively keep the best schools almost entirely white.<sup>43</sup> Fourth, the Court has never adopted a full remedy for all of the educational discrimination against colored people or its lingering effects.<sup>44</sup> Moreover, the Court has never interpreted the Constitution in a manner that prohibits all of these practices, whether sophisticated or simple-minded exclusions of colored people, indicating the Court's agreement with white educational privilege and/or its apparent powerlessness to control those ruling whites intent on preserving white supremacy.<sup>45</sup>

Alabama provides a good illustration. Consider the theft of equal educational opportunity at the University of Alabama.<sup>46</sup> Even before

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41. *Id.* at 21. For example, Alabama made it law that white and colored children shall attend separate schools. See ALA. CONST. OF 1901 art. XIV, § 256.

42. MURRAY, *supra* note 40, at 22-30. Murray explains how in Alabama separate schools and colleges were established for white students and colored students. *Id.* at 22-23.

43. *Id.* at 15-20. Murray illustrates the scope of segregation in education and other areas of public life, noting that it is a mistake to apply a black-white paradigm or to conclude that segregation was a problem unique to the South. See Appendix B.

44. *Brown* was framed to work prospectively. For all of its potential, it did not address cumulative educational disadvantages resulting from centuries of undereducation and miseducation. The Court's holding did not require educational reparations. By focusing on stigma on colored children, the Court missed the cumulative educational advantages for whites that were the chief aim of segregation. The Court also failed to give colored children full relief from educational caste.

45. Neither *Bakke* nor *Grutter* dismantles white educational hegemony. Indeed, each preserves a disproportionate share of the best educational opportunities for whites with higher test scores. Each decision rests on theories of merit, masking the nonmeritocratic history of educational opportunity in the United States. Simply stated, U.S. educational history has been anything but meritocratic. The Court's decisions should acknowledge relevant history, rather than write as if it never happened.

46. See generally E. CULPEPPER CLARK, *THE SCHOOLHOUSE DOOR: SEGREGATION'S LAST STAND AT THE UNIVERSITY OF ALABAMA* (1993); 1 JAMES B. SELLERS, *HISTORY OF THE*

the admission of Alabama to the Union, Congress approved some 46,080 acres for a seminary of learning within the Alabama Territory.<sup>47</sup> Over 45,000 acres of that land would be sold on installment or leased to raise revenues for the new school, and there is significant evidence that wealthy landowners were given multiple favorable extensions by University Trustees to discharge their debts to the University.<sup>48</sup>

Ultimately, Tuscaloosa was designated the site for the University of Alabama. The initial plan was to enroll approximately 100 boys. Just over half that number showed up and were enrolled on April 18, 1831, after the faculty agreed to relax the University's entrance requirements.<sup>49</sup> Those 52 boys became Alabama's newest affirmative action recipients.

Professor Sellers' fine book on the history of the University of Alabama describes these first boys as the sons of rich planters who brought slaves with them to Tuscaloosa and other less fortunate boys who brought hams and other farm produce to offset their expenses.<sup>50</sup> What he does not discuss is the educational theft that occurred through the exclusion of all nonwhite boys and all girls from the state's premier university. These preferences for a few white boys (and then a few white girls) at the University of Alabama remained legal practice for nearly 132 years.<sup>51</sup>

Year after year, for over six generations, colored men and women were robbed, denying them the equal opportunity for educational advancement because of slavery, segregation, and overt discriminatory custom. Their children were also robbed of what their parents might have achieved, accumulated, and passed on. The costs of these thefts have never been measured. There have been no reparations nor apologies. Their grandchildren's legacies were stolen without remedy. Millions of colored people throughout the country, American citizens with darker skin, were forced into educational caste by ruling, self-aggrandizing white elites who built their legally constructed superiority on the backs and necks of those excluded Americans, duping poor whites along the way with the fantasy of white superiority.

Only a few broke through against their caste. Autherine Lucy, Pollie Myers, Vivian Malone, and James Hood conquered the

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UNIVERSITY OF ALABAMA (1953); Bryan K. Fair, *Equality for All: The Case for a New Declaration of Rights Article of the Alabama Constitution*, 33 CUMB. L. REV. 339 (2003).

47. SELLERS, *supra* note 46, at 7-27.

48. *Id.*

49. *Id.* at 115-44.

50. *Id.* at 116-18.

51. CLARK, *supra* note 46, at 3-23, 53-89.

University of Alabama's wall of educational caste.<sup>52</sup> At the University of North Carolina there was Thomas Hocutt; at the University of Virginia, it was Alice Jackson; at Tennessee, there was William Redmond; at Maryland, there was Donald Murray; at Texas at Austin, it was Heman Sweatt; at Oklahoma, there were Ada Sipuel Fisher and Dr. G.W. McLaurin; at Missouri, it was Lloyd Gaines; at Mississippi, it was James Meredith; at Georgia, there were Charlayne Hunter and Hamilton Holmes; at Clemson, it was Harvey Gantt; at Florida, it was Virgil Hawkins.<sup>53</sup> Yet, this Civil Rights Hall of Fame is the nation's Hall of Shame, with many stories still untold.

Throughout the first half of the twentieth century, many of the same states found additional ways to prevent colored people from attaining equal educational opportunity. One common practice was to pay colored teachers less than white teachers and to establish unequal facilities for white schools and colored schools. For colored students seeking college training, another strategy was to send them out of state to colleges that would admit colored students, rather than permit colored students to attend schools with whites. Some states were so committed to segregation that they started colleges of law, dentistry, or medicine for one or two colored people, or they created regional compacts with neighboring states that would allow members to send colored students to a few locations while maintaining white schools. As Pauli Murray perceptively illustrates, segregation was the rule in twenty-two American jurisdictions, and the practice in many others.<sup>54</sup> Educational segregation was not limited to Southern states; it was the norm for most of the country, locking colored people out of the best schools in the United States and relegating them to patently inferior schools.<sup>55</sup>

#### IV. SCORING SEATS BY CASTE: WHY EVERYONE LOSES

The Supreme Court embraced a separate but equal principle in *Plessy v. Ferguson*,<sup>56</sup> thereby permitting government officials to allocate benefits by color. And the Court was slow to acknowledge that in almost every case schools and colleges were separate but

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52. See generally *id.* (providing a detailed account of the experiences these four people overcame in breaking through their caste).

53. S. EDUC. FOUND., ENDING DISCRIMINATION IN HIGHER EDUCATION 1-5 (1974).

54. MURRAY, *supra* note 40, at 14-15, 22-28 (describing Alabama's schemes and devices to support segregation).

55. *Id.* at 14-15.

56. 163 U.S. 537 (1896). Only Justice John Marshall Harlan understood the damage separate but equal would cause to future generations. He knew the result would be *caste*.

*unequal*. Finally, forty years after *Plessy*, the Court began to note that states had failed to afford equal educational opportunity to colored people. The Court ruled that it was unconstitutional for Missouri to require colored citizens to attend law school out of state or to wait until the state had sufficient demand for a law school for colored students.<sup>57</sup> Equal protection meant that equal educational opportunities must be made available within the state or Lloyd Gaines should be enrolled in the all-white law school.<sup>58</sup> This practice led to the creation of some twenty historically black law schools.<sup>59</sup> Later the Court found that Ada Sipuel and Dr. McLaurin could not be excluded from graduate programs at Oklahoma.<sup>60</sup> And the Court rejected arguments from Texas whites that they would establish a separate but equal law school for Heman Sweatt rather than enroll him at the University of Texas at Austin School of Law.<sup>61</sup> The Court explained how the new law school was not equal, by tangibles or intangibles, because of resources, faculty, library, and alumni differences.<sup>62</sup>

But that was not the end of it. Segregation did not tumble down. Historically white schools reluctantly admitted small numbers of colored students.<sup>63</sup> Alabama admitted its first three African-American law students in 1969. Since then, most of the law schools for colored students have been closed.<sup>64</sup> And today only a small number of students of color attend law school anywhere, except a few mission schools. At Alabama, the state's only public law school, today fewer than thirty-five African-American students are enrolled. This result is rationalized based on performance gaps on standardized tests such as the LSAT. There is approximately a ten-point disparity between the

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57. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 352 (1938).

58. *Id.* at 350.

59. See generally Denise W. Haymore, Comment, *Black Law Schools: The Continuing Need*, 16 S.U. L. REV. 249 (1989); Gil Kujovic, *Equal Opportunity in Higher Education and the Black Public College: The Era of Separate but Equal*, 72 MINN. L. REV. 29 (1987).

60. *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631, 632-33 (1948).

61. *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950).

62. *Id.* at 632-34.

63. For an account of the reluctant desegregation of white schools, see generally DAVID J. ARMOR, *FORCED JUSTICE: SCHOOL DESEGREGATION AND THE LAW* (1995); CLARK, *supra* note 46.

64. Bryan K. Fair, *Been in the Storm Too Long, Without Redemption: What We Must Do Next*, 25 S.U. L. REV. 121 (1997).

median LSAT scores of African-American students and white students.<sup>65</sup>

That differential is not unlike others in reading and math performance in elementary and secondary school. The following charts illustrate that there is a racial disparity between blacks and whites throughout grade levels.

Average Mathematics Test Scores,  
National Assessment of Educational Progress Tests<sup>66</sup>

Year	Age 9	Black			White	
		Age 13	Age 17	Age 9	Age 13	Age 17
1973	190.0	228.0	270.0	225.0	274.0	310.0
1978	192.4	229.6	268.4	224.1	271.6	305.9
1982	194.9	240.4	271.8	224.0	274.4	303.7
1986	201.6	249.2	278.6	226.9	273.6	307.5
1990	208.4	249.1	288.5	235.2	276.3	309.5
1992	208.0	250.2	285.8	235.1	278.9	311.9
1994	212.1	251.5	285.5	236.8	280.8	312.3
1996	211.6	252.1	286.4	236.8	281.2	313.4
1999	210.9	251.0	283.3	238.8	283.1	314.8

*Scale from 0 to 500:*

150: Simple arithmetic facts

200: Beginning skills and understanding

250: Numerical operations and beginning problem solving

300: Moderately complex procedures and reasoning

350: Multi-step problem solving and algebra

Average Reading Test Scores,  
National Assessment of Educational Progress Tests<sup>67</sup>

Year	Age 9	Black			White	
		Age 13	Age 17	Age 9	Age 13	Age 17
1971	170.1	222.4	238.7	214	260.9	291.4
1975	181.2	225.7	240.6	216.6	262.1	293
1980	189.3	232.8	243.1	221.3	264.4	292.8
1984	185.7	236.3	264.3	218.2	262.6	295.2
1988	188.5	242.9	274.4	217.7	261.3	294.7
1990	181.8	241.5	267.3	217	262.3	296.6
1992	184.5	237.6	260.6	217.9	266.4	297.4

65. According to the Law School Admissions Council, the median score of all LSAT takers is 151. Whites and some Asian students have the highest median scores of 152-153. Latinos have a median of 147; Native Americans have a median score of 143; African Americans have a median score of 142.

66. Jay R. Campbell et al., *Three Decades of Student Performance* 17 & tbl. B.8 (Washington: U.S. Department of Education, Office of Educational Research and Improvement, National Center for Education Statistics, 2000), reprinted in GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 180 app. tbl. 6 (2002).

67. *Id.* at 18 & B.9, reprinted in LOURY, *supra* note 66, at 181 app. tbl. 7.

1994	185.4	234.3	266.2	218	265.1	295.7
1996	190.9	234	266.1	219.6	265.9	295.1
1999	185.5	238.2	263.9	221	266.7	294.6

*Scale from 0 to 500:*

150: Simple, discrete reading skills

200: Partially developed skills and understanding

250: Interrelate ideas and make generalizations

300: Understand complicated information

350: Learn from specialized reading materials

Even if we acknowledge these gaps and conclude there is no excuse for them, we must still determine why the gaps are so decisive in the allocation of educational opportunity. Do these gaps prove that those with lower scores are less trainable or less deserving of the best educational resources? Do the gaps mean that those with higher scores will be better professionals, providing better services? Do the gaps mean that some children have worked harder, meriting better opportunities, scholarships, and support? Do the gaps mean that those with lower scores should be relegated to second- and third-tier schools? For me, these gaps confirm that there are savage inequalities in schools throughout the United States.<sup>68</sup> The gaps reflect the outcome of cumulative educational disadvantage over the lifetime of some children. And rather than punish those children even further, we should lift them up, challenging them with the very best educational environments available. Only then, will we eliminate educational caste.

I expect little significant change in the racial allotment of educational opportunity in the South or in the nation post-*Grutter*. Like Professor Bell, I assume that ruling elites will continue to demand and obtain a disproportionate share of the best educational opportunities and that American courts will continue to expound our Constitution in perverse ways that entrench white entitlement.<sup>69</sup> I expect that in the name of white innocence and white equality, our courts and admissions committees will endorse the continued second-caste status of Americans with darker skin, by significantly closing off our best schools to their enrollment, beyond token numbers. And it is simply no answer to say that “those people can go to a less elite school

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68. See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1991) (providing first-hand accounts of the inferior educational opportunities available to inner-city minority youths).

69. DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1993).

and perform better.”<sup>70</sup> For the same can be said for the white plaintiffs in *Grutter* and *Gratz v. Bollinger*,<sup>71</sup> they too can go to a less elite school and perform better. To paraphrase the late Reginald F. Lewis, *Why Should White Guys Have All the Fun* at our best schools?<sup>72</sup> It is unfair to tell colored people they cannot attend those schools. It is unfair to pretend that whites are entitled to any, or every, seat at the best schools. Whites have no greater moral claim to any benefit. And colored people should not disproportionately suffer the multiple burdens of our legal and social history.

Yet, the real problem is that some folks believe that standardized test score disparities are IQ indicators, confirming whites are more intelligent and more qualified than most colored applicants and, therefore, more deserving of elite educational opportunities.<sup>73</sup> But one does not have to travel too far to recall that we “darkies” have been reminded of our unfitness for citizenship, for education, and for respect across this country throughout its history.

It seems perplexing to many Americans, including many law professors at elite law schools, why there are disparities among various ethnic groups on the LSAT or similar tests. Is it possible that educational inputs and environmental supports are so vastly different that, after twenty-two years, the cumulative educational experiences yield different outcomes? Of course it is. Is there a difference between being undereducated and uneducable or undertrained and untrainable? Of course there is. Should we allow test scores that largely reveal education and income privileges to be the principal basis for allocating educational opportunities? I would say “no.” If test scores are to any extent a product of our discriminatory educational history, they should not be used to give continuing preferences primarily to wealthier whites. Comedian and social commentator Chris Rock, in a recent film about American hypocrisy, reminds us that some things simply are not right.<sup>74</sup> It isn’t right for our Court to adopt an analytical theory that will extend more unfair privileges to whites and deny remedial action to colored people.

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70. Justice Thomas’s dissenting opinion in *Grutter* complains about overmatched minority students. 539 U.S. 306, 349-78 (2003) (Thomas, J., dissenting). Yet, he does not indicate whether he was overmatched at Holy Cross or Yale Law School. Many colored people went to Yale Law School and succeeded, despite their prior educational pedigree.

71. 539 U.S. 244 (2003).

72. REGINALD F. LEWIS, WHY SHOULD WHITE GUYS HAVE ALL THE FUN?: HOW REGINALD LEWIS CREATED A BILLION-DOLLAR BUSINESS EMPIRE (1994).

73. See *Grutter*, 539 U.S. at 381-83 (Rehnquist, C.J., dissenting).

74. HEAD OF STATE (DreamWorks Pictures 2003).

The constitutional analysis applied in *Grutter* will produce few real winners.

First, it is hard to conclude that minority students are winners when only a small number will likely gain admission at elite public schools. These schools have the best per-pupil expenditures, the best faculty, the best libraries, the best facilities, and students who have over their lives had the broadest, richest educational experiences. Those who attend are fast-tracked to power. And it is that power which some refuse to share with colored people.

The fact is higher education in the United States remains segregated, a legacy of de jure racist government policies and de facto racist customs advantaging those classified as whites. The *Grutter* Court has again closed its eyes to relevant legal history and traditions, ignoring government misconduct excluding specific groups of individuals over six generations from equal educational opportunity. In Alabama, it began in 1831. For the next 132 years, whites blocked colored people from enrolling at the University of Alabama. Of course, this story rings familiar, only by a degree of difference, elsewhere in the country. The Constitution should be read to dismantle every aspect or vestige of educational caste, root and branch. It should not leave in place white educational hegemony. That isn't right.

Second, legal claims grounded on theories of merit, white entitlement, or white victimhood are not legitimate in a society that has never by law adopted antiwhiteness as a core American value. Claims of reverse discrimination against whites, individually or as a group, are grossly overstated. Even under Jim Crow laws or customs, some white people were rejected by colleges. Some applicants must be rejected, but there is no justification for colored people to be disproportionately excluded.

Most of the flagship universities in the United States are historically and currently majority white.<sup>75</sup> No school excludes whites because of race. That is a lie told repeatedly to make excluded whites feel better. But what about making colored people feel better. And what better way than to say that what happened was wrong and people of color are entitled to opportunities as well. I feel better just hearing those words. I feel better because I recognize that such opportunities changed my life.<sup>76</sup>

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75. See Appendix A.

76. See FAIR, NOTES OF A RACIAL CASTE BABY, *supra* note 3, at 1-65.

Whites receive a disproportionate share of the best educational resources throughout the country. It has always been this way in the United States because the Court has been unwilling to interpret the Constitution to require otherwise. Now the Court would apply a sameness equality theory that surely will preserve the cumulative advantages that whites gathered, generation after generation, for nearly seven score years since the adoption of the Fourteenth Amendment. That isn't right.

Third, the Court has avoided another opportunity to discuss the educational thefts that have been centerpieces of white privilege throughout the country, rendering those robberies of equal opportunity invisible and protected from legal reform and portraying colored Americans as inferior and their caste as normal. Colored people were never inferior to whites. No superior individual or group would need to rig laws and exploit others and then look down on them. Government exclusion and neglect created the disparities in educational experience and scholastic performance among groups and individuals by adopting laws antithetical to equal educational opportunity. Now the government has an affirmative duty to correct what it caused. And no individual has the right to prevent government from eliminating educational caste. Our Constitution must do for the elimination of educational caste what it once did to create it. Anything less isn't right.

Fourth, few of the justices of the Court acknowledge that educational caste remains extant in university life, and it seems fanciful to assume it will be dismantled within twenty-five years. Nothing in *Grutter* requires that government dismantle educational caste. The Court has not compelled states with the most egregious records of discrimination to eliminate educational caste; it has not investigated its causes or offered meaningful remedies. Indeed, *Grutter* suggests that its limited remedy is, at bottom, inconsistent with the Fourteenth Amendment, a provision adopted primarily to dismantle black caste, but which instead has been used to protect corporations and whites. That isn't right.

## V. CONCLUSION: BEATING BACK THE EVIL OF CASTE

An antidiscrimination equality theory cannot eliminate cumulative educational caste. It rests on an outmoded view of racial

prejudice, requiring plaintiffs to point to bad acts of bad actors.<sup>77</sup> It ignores structures in the society that have created educational caste. It ignores government's participation in the creation and expansion of second-caste citizenship. It masks racialized markings which prevent some Americans from becoming white enough to escape caste.

The Court must adopt a broader theory of equality, one that permits government to distinguish between policies resting on exclusionary, demeaning stereotypes and policies promoting greater inclusion and opportunity. Like Professor Cass Sunstein, I endorse an anticaste theory of equality that requires government to dismantle educational caste.<sup>78</sup> Unlike Sunstein, I would not limit this principle to the legislative departments.<sup>79</sup> All agencies of our government, including the Court and admissions committees, must say to whites who assert claims of white innocence that they are not victims of invidious discrimination, that colored people are innocent as well, and that whites are not entitled to any or every seat before colored applicants simply because today they often present higher test scores.

Like Professor Ken Karst, I embrace a broad equal citizenship principle.<sup>80</sup> The government must not allow ruling elites to establish one set of rules for themselves and another set for those in subjugated castes. In this way, the equality guarantee is countermajoritarian. As Justice John Marshall Harlan said, "There is no caste here."<sup>81</sup>

The Supreme Court and admissions committees must not let the Fourteenth Amendment be used to extend white educational privilege another day. To do so isn't right. As Chief Justice John Marshall once reminded his colleagues that "we must never forget, it is *a Constitution* we are expounding,"<sup>82</sup> we should interpret it to repudiate educational caste and white entitlement. To do otherwise isn't right.

This anticaste theory would complete Charles Sumner's dream of eliminating black caste.<sup>83</sup> Even more, it would say to all Americans, including all colored persons, that our majestic Constitution can do for the elimination of caste what it once did to create it and that there is a

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77. See Alan David Freeman, *Legitimizing Racial Discrimination Through AntiDiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).

78. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 139 (1993).

79. *Id.* at 145.

80. KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 3 (1989).

81. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

82. *McCulloch v. Maryland*, 4 Wheat. 316, 407 (1819).

83. Fair, *Anatomy of American Caste*, *supra* note 3, at 392-94.

significant constitutional difference between exclusionary policies that rest on demeaning caricatures and stereotypes and remedial policies that promote broad opportunities for inclusion. The former are invidious and unconstitutional; the latter are neither. This distinction should inform our equality jurisprudence. If we do otherwise, then our Constitution may not be worth expounding.

Appendix A. Selected statistics for degree-granting institutions  
with more than 14,600 students in 1999

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
---	United States, all institutions <sup>5</sup>	---	---	---	13,818,637	6,490,646	8,300,578	<sup>6</sup> 28
---	Colleges with enrollment over 14,600	---	---	---	5,102,204	2,424,095	2,867,533	31
1	Auburn University, Main Campus	Ala.	1	1	21,537	11,536	10,584	10
2	University of Alabama	Ala.	1	1	19,794	8,974	9,770	16
3	University of Alabama at Birmingham	Ala.	1	1	15,356	6,396	8,702	28
4	University of Alaska, Anchorage	Alaska	1	1	17,490	5,697	9,049	20
5	Arizona State University, Main Campus	Ariz.	1	1	42,936	20,971	23,244	22
6	Glendale Community College	Ariz.	1	2	18,512	8,396	10,735	28
7	Mesa Community College	Ariz.	1	2	19,818	10,587	11,708	25
8	Northern Arizona University	Ariz.	1	1	16,992	7,875	12,106	20
9	Pima Community College	Ariz.	1	2	28,766	14,022	16,526	40
10	University of Arizona	Ariz.	1	1	35,729	16,335	17,991	25
11	University of Arkansas, Fayetteville	Ark.	1	1	14,732	7,729	7,438	13
12	American River College	Calif.	1	2	18,716	9,794	12,140	32
13	Cal. Polytechnic State U., San Luis Obispo	Calif.	1	1	17,751	9,051	7,419	29
14	California State Polytechnic U., Pomona	Calif.	1	1	19,468	9,939	8,082	69
15	California State University, Chico	Calif.	1	1	16,633	6,939	8,322	20
16	California State University, Fresno	Calif.	1	1	19,960	7,785	10,536	52
17	California State University, Fullerton	Calif.	1	1	25,592	11,090	16,077	56

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
18	California State University, Long Beach	Calif.	1	1	33,987	12,357	17,654	58
19	California State University, Los Angeles	Calif.	1	1	21,597	7,751	12,032	83
20	California State University, Northridge	Calif.	1	1	31,167	11,118	16,829	54
21	California State University, Sacramento	Calif.	1	1	26,336	10,214	14,316	43
22	Cerritos College	Calif.	1	2	15,886	9,067	11,383	83
23	City College of San Francisco	Calif.	1	2	24,408	12,474	15,512	68
24	Cosumnes River College	Calif.	1	2	8,235	5,783	8,831	41
25	De Anza College	Calif.	1	2	21,948	11,068	12,196	63
26	Diablo Valley College	Calif.	1	2	20,255	8,873	10,343	37
27	East Los Angeles College	Calif.	1	2	12,447	6,254	9,517	97
28	El Camino College	Calif.	1	2	25,789	10,116	12,500	71
29	Foothill College	Calif.	1	2	12,811	7,854	7,429	43
30	Fresno City College	Calif.	1	2	14,710	7,514	9,225	62
31	Fullerton College	Calif.	1	2	17,548	8,643	9,568	52
32	Grossmont College	Calif.	1	2	15,357	6,883	9,276	32
33	Long Beach City College	Calif.	1	2	18,378	7,997	10,733	68
34	Mount San Antonio College	Calif.	1	2	20,563	10,372	12,343	72
35	National University	Calif.	2	1	8,836	7,048	10,017	37
36	Orange Coast College	Calif.	1	2	22,365	10,614	11,328	43
37	Palomar College	Calif.	1	2	16,707	9,900	10,592	34
38	Pasadena City College	Calif.	1	2	19,581	10,080	12,898	79
39	Riverside Community College	Calif.	1	2	15,683	9,070	13,250	52
40	Sacramento City College	Calif.	1	2	14,474	7,115	9,888	55
41	Saddleback College	Calif.	1	2	14,527	7,719	10,335	26
42	San Diego Mesa College	Calif.	1	2	23,410	9,994	10,865	44
43	San Diego State University	Calif.	1	1	35,493	13,473	17,940	46
44	San Francisco State University	Calif.	1	1	29,343	10,878	16,823	60

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
45	San Joaquin Delta College	Calif.	1	2	14,792	6,314	9,248	53
46	San Jose State University	Calif.	1	1	30,334	12,381	14,556	64
47	Santa Ana College	Calif.	1	2	20,532	10,154	8,042	73
48	Santa Monica College	Calif.	1	2	18,108	11,569	14,803	60
49	Santa Rosa Junior College	Calif.	1	2	20,475	8,998	12,730	19
50	Sierra College	Calif.	1	2	11,637	7,276	9,355	14
51	Southwestern College	Calif.	1	2	13,010	7,444	8,905	83
52	Stanford University	Calif.	2	1	14,724	10,408	7,675	37
53	University of California, Berkeley	Calif.	1	1	30,634	15,872	15,475	57
54	University of California, Davis	Calif.	1	1	23,890	11,412	13,680	48
55	University of California, Irvine	Calif.	1	1	16,808	9,719	9,558	68
56	University of California, Los Angeles	Calif.	1	1	36,420	17,315	19,036	57
57	University of California, San Diego	Calif.	1	1	17,790	10,006	9,888	52
58	University of California, Santa Barbara	Calif.	1	1	18,385	9,414	10,642	34
59	University of Phoenix, Southern California	Calif.	3	1	---	9,438	12,458	50
60	University of Southern California	Calif.	2	1	28,374	15,109	13,657	47
61	Colorado State University	Colo.	1	1	26,828	12,911	14,125	11
62	Metropolitan State College of Denver	Colo.	1	1	17,400	7,662	10,054	24
63	University of Colorado at Boulder	Colo.	1	1	28,600	15,093	13,758	14
64	University of Connecticut	Conn.	1	1	25,497	8,993	9,728	15
65	University of Delaware	Del.	1	1	20,818	9,070	12,136	12
66	George Washington University	D.C.	2	1	19,103	9,641	10,705	28
67	Broward Community College	Fla.	1	2	24,365	9,654	15,066	51

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
68	Florida Atlantic University, Boca Raton	Fla.	1	1	12,767	7,739	12,387	30
69	Florida Community College at Jacksonville	Fla.	1	2	20,974	8,062	11,583	32
70	Florida International University	Fla.	1	1	22,466	13,655	17,638	76
71	Florida State University	Fla.	1	1	28,170	14,582	18,296	23
72	Hillsborough Community College	Fla.	1	2	19,134	7,132	10,187	37
73	Miami-Dade Community College	Fla.	1	2	50,078	18,931	28,221	88
74	Nova Southeastern University	Fla.	2	1	9,562	6,215	11,595	38
75	Palm Beach Community College	Fla.	1	2	18,392	6,606	10,356	32
76	Saint Petersburg Junior College	Fla.	1	2	20,012	8,146	11,818	16
77	University of Central Florida	Fla.	1	1	21,541	14,095	17,578	24
78	University of Florida	Fla.	1	1	35,477	21,311	22,071	24
79	University of South Florida	Fla.	1	1	32,326	14,274	20,565	25
80	Valencia Community College	Fla.	1	2	18,438	11,429	14,947	38
81	Georgia State University	Ga.	1	1	23,336	9,343	14,067	36
82	University of Georgia	Ga.	1	1	28,395	13,768	17,144	11
83	University of Hawaii at Manoa	Hi.	1	1	18,799	7,783	9,829	75
84	Boise State University	Idaho	1	1	13,367	7,153	9,062	9
85	College of Du Page	Ill.	1	2	29,185	12,612	16,420	24
86	DePaul University	Ill.	2	1	15,711	8,793	10,756	32
87	Illinois State University	Ill.	1	1	22,662	8,453	12,017	12
88	Northern Illinois University	Ill.	1	1	24,509	10,233	12,610	22
89	Northwestern University	Ill.	2	1	17,041	8,641	8,400	27
90	Southern Illinois University, Carbondale	Ill.	1	1	24,078	12,399	9,924	21
91	Triton College	Ill.	1	2	16,759	8,164	10,533	37

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
92	University of Illinois at Chicago	Ill.	1	1	24,959	11,110	13,500	48
93	University of Illinois at Urbana	Ill.	1	1	38,163	20,573	18,278	25
94	William Rainey Harper College	Ill.	1	2	16,509	6,398	8,419	30
95	Ball State University	Ind.	1	1	20,343	8,598	10,040	8
96	Indiana University, Bloomington	Ind.	1	1	35,451	17,002	19,199	10
97	Indiana U.-Purdue U. at Indianapolis	Ind.	1	1	27,517	11,621	15,966	14
98	Purdue University, Main Campus	Ind.	1	1	37,588	22,975	16,496	10
99	Iowa State University	Iowa	1	1	25,737	14,520	11,590	8
100	University of Iowa	Iowa	1	1	28,785	13,644	15,202	10
101	Johnson County Community College	Kans.	1	2	13,740	7,279	8,767	11
102	Kansas State University	Kans.	1	1	21,137	11,175	10,368	8
103	University of Kansas, Main Campus	Kans.	1	1	26,434	12,016	13,390	10
104	Eastern Kentucky University	Ky.	1	1	15,290	6,096	8,880	5
105	University of Kentucky	Ky.	1	1	22,538	10,976	12,084	9
106	University of Louisville	Ky.	1	1	22,979	9,020	10,872	16
107	Western Kentucky University	Ky.	1	1	15,170	6,090	9,024	9
108	Louisiana St. U. & A&M & Hebert Laws Center	La.	1	1	26,112	15,008	16,631	17
109	Southeastern Louisiana University	La.	1	1	10,262	5,625	9,550	16
110	University of Louisiana at Lafayette	La.	1	1	15,764	7,134	9,217	23
111	University of New Orleans	La.	1	1	15,322	6,686	9,182	35
112	Johns Hopkins University	Md.	2	1	13,363	8,911	8,890	22
113	Towson State University	Md.	1	1	15,035	6,251	10,396	17
114	University of Maryland, College Park Campus	Md.	1	1	34,829	16,962	15,902	33

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
115	University of Maryland, University College	Md.	1	1	14,476	7,120	8,553	44
116	Boston College	Mass.	2	1	14,502	6,750	8,023	18
117	Boston University	Mass.	2	1	27,996	12,487	16,000	24
118	Harvard University	Mass.	2	1	22,851	12,504	11,710	33
119	Northeastern University	Mass.	2	1	30,510	11,653	11,903	19
120	University of Massachusetts, Amherst	Mass.	1	1	26,025	12,331	12,700	17
121	Central Michigan University	Mich.	1	1	18,286	11,016	15,305	14
122	Eastern Michigan University	Mich.	1	1	25,011	8,868	14,088	20
123	Grand Valley State University	Mich.	1	1	11,725	6,800	10,652	9
124	Lansing Community College	Mich.	1	2	22,343	7,587	9,090	17
125	Macomb Community College	Mich.	1	2	31,538	10,572	11,146	9
126	Michigan State University	Mich.	1	1	44,307	19,969	23,069	16
127	Oakland Community College, Bloomfield Hills	Mich.	1	2	28,069	9,515	13,729	21
128	Oakland University	Mich.	1	1	12,400	5,165	9,561	12
129	University of Michigan, Ann Arbor	Mich.	1	1	36,391	19,997	17,849	27
130	Wayne State University	Mich.	1	1	33,872	13,132	17,893	38
131	Western Michigan University	Mich.	1	1	26,989	12,462	15,282	10
132	University of Minnesota, Twin Cities	Minn.	1	1	57,168	21,577	23,784	15
133	Mississippi State University	Miss.	1	1	14,391	8,715	7,361	20
134	Southwest Missouri State University	Mo.	1	1	19,480	7,573	9,815	6
135	University of Missouri, Columbia	Mo.	1	1	25,058	10,958	11,972	11
136	University of Missouri, St. Louis	Mo.	1	1	15,393	5,994	9,600	17
137	University of Nebraska at Lincoln	Nebr.	1	1	24,453	11,620	10,522	7
138	Community College of Southern Nevada	Nev.	1	2	14,161	15,639	17,763	39

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
139	University of Nevada, Las Vegas	Nev.	1	1	17,937	9,669	12,151	28
140	University of New Hampshire, Main Campus	N.H.	1	1	13,260	5,955	8,722	4
141	Rutgers University, New Brunswick	N.J.	1	1	33,016	15,864	19,444	34
142	Albuquerque Technical-Vocational Institute	N.Mex.	1	2	9,739	6,937	9,265	54
143	New Mexico State University, Main Campus	N. Mex.	1	1	14,812	7,219	8,230	47
144	University of New Mexico, Main Campus	N. Mex.	1	1	23,950	10,359	14,015	40
145	Columbia University in the City of New York	N.Y.	2	1	18,242	10,500	10,667	29
146	CUNY, Bernard M. Baruch College	N.Y.	1	1	15,849	6,838	8,416	66
147	CUNY, Borough of Manhattan Community College	N.Y.	1	2	14,819	5,456	9,537	90
148	CUNY, Brooklyn College	N.Y.	1	1	16,605	5,309	9,748	48
149	CUNY, Hunter College	N.Y.	1	1	19,639	5,646	14,355	55
150	CUNY, Kingsborough Community College	N.Y.	1	2	13,809	5,977	9,106	52
151	CUNY, Queens College	N.Y.	1	1	18,072	5,442	10,244	39
152	Monroe Community College	N.Y.	1	2	13,545	7,046	7,769	22
153	Nassau Community College	N.Y.	1	2	21,537	9,473	10,626	32
154	New York University	N.Y.	2	1	32,813	15,627	21,505	37
155	Saint John's University, New York	N.Y.	2	1	19,105	7,855	10,623	39
156	SUNY at Albany	N.Y.	1	1	17,400	7,984	8,917	23
157	SUNY at Buffalo	N.Y.	1	1	27,638	12,706	11,550	22
158	SUNY at Stony Brook	N.Y.	1	1	17,624	9,029	10,110	41
159	Syracuse University	N.Y.	2	1	21,900	8,483	10,052	18
160	Central Piedmont Community College	N.C.	1	2	16,311	6,493	8,318	32

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
161	East Carolina University	N.C.	1	1	17,564	7,631	11,180	17
162	North Carolina State University at Raleigh	N.C.	1	1	27,199	16,257	11,754	18
163	University of North Carolina at Chapel Hill	N.C.	1	1	23,878	10,024	14,629	18
164	University of North Carolina at Charlotte	N.C.	1	1	14,699	7,707	9,243	24
165	Bowling Green State University, Main Campus	Ohio	1	1	18,657	7,626	10,573	8
166	Cleveland State University	Ohio	1	1	19,214	7,043	8,640	27
167	Columbus State Community College	Ohio	1	2	13,290	7,559	10,103	23
168	Cuyahoga Community College District	Ohio	1	2	23,157	6,897	12,538	35
169	Kent State University, Main Campus	Ohio	1	1	24,434	8,585	13,068	10
170	Miami University, Oxford	Ohio	1	1	15,835	7,400	9,175	8
171	Ohio State University, Main Campus	Ohio	1	1	54,087	24,404	23,599	16
172	Ohio University, Main Campus	Ohio	1	1	18,505	9,005	10,633	6
173	Sinclair Community College	Ohio	1	2	16,367	7,920	10,425	22
174	University of Akron, Main Campus	Ohio	1	1	28,801	9,809	11,878	18
175	University of Cincinnati, Main Campus	Ohio	1	1	31,013	13,849	13,618	19
176	University of Toledo	Ohio	1	1	24,691	9,327	10,710	18
177	Oklahoma State University, Main Campus	Okla.	1	1	19,827	11,249	9,765	15
178	Tulsa Junior College	Okla.	1	2	17,955	6,627	9,344	18
179	University of Oklahoma, Norman Campus	Okla.	1	1	20,774	12,085	11,609	24
180	Oregon State University	Oreg.	1	1	16,361	8,548	7,493	15
181	Portland Community College	Oreg.	1	2	21,888	10,261	12,140	21
182	Portland State University	Oreg.	1	1	16,921	7,776	10,408	19

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
183	University of Oregon	Oreg.	1	1	18,840	8,134	9,102	14
184	Community College of Allegheny County	Pa.	1	2	20,553	6,780	8,450	17
185	Community College of Philadelphia	Pa.	1	2	15,151	5,782	10,417	66
186	Pennsylvania State University, Main Campus	Pa.	1	1	38,864	21,976	18,682	12
187	Temple University	Pa.	1	1	29,714	12,216	15,908	37
188	University of Pennsylvania	Pa.	2	1	21,868	10,905	10,950	25
189	University of Pittsburgh, Main Campus	Pa.	1	1	28,120	12,342	13,820	15
190	Community College of Rhode Island	R.I.	1	2	16,620	5,938	9,672	17
191	Clemson University	S.C.	1	1	15,714	9,181	7,801	10
192	University of South Carolina at Columbia	S.C.	1	1	25,613	10,277	13,153	22
193	Middle Tennessee State University	Tenn.	1	1	14,865	8,726	10,267	14
194	University of Memphis	Tenn.	1	1	20,681	8,518	11,783	34
195	University of Tennessee, Knoxville	Tenn.	1	1	26,055	12,741	13,696	9
196	Austin Community College	Tex.	1	2	24,251	12,046	14,089	33
197	Central Texas College	Tex.	1	2	4,815	8,557	6,079	50
198	El Paso Community College	Tex.	1	2	17,081	7,321	11,359	89
199	Houston Community College System	Tex.	1	2	36,437	16,922	20,960	65
200	North Harris-Montgomery Community College	Tex.	1	2	15,653	8,924	13,189	30
201	San Antonio College	Tex.	1	2	20,083	8,126	11,230	58
202	Southwest Texas State University	Tex.	1	1	20,940	9,691	12,078	26
203	Tarrant County Junior College	Tex.	1	2	28,161	11,058	14,910	28
204	Texas A&M University	Tex.	1	1	41,171	23,466	20,351	16
205	Texas Tech University	Tex.	1	1	25,363	12,973	11,276	16

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
206	The University of Texas at Arlington	Tex.	1	1	24,782	9,145	10,004	35
207	The University of Texas at Austin	Tex.	1	1	49,617	24,678	24,331	30
208	The University of Texas at El Paso	Tex.	1	1	16,524	6,784	7,911	81
209	The University of Texas at San Antonio	Tex.	1	1	15,489	8,317	10,291	54
210	University of Houston, University Park	Tex.	1	1	33,115	15,118	17,533	51
211	University of North Texas	Tex.	1	1	27,160	11,988	14,505	22
212	Brigham Young University	Utah	2	1	31,662	15,707	17,024	6
213	Salt Lake Community College	Utah	1	2	13,344	11,024	9,775	11
214	University of Utah	Utah	1	1	24,922	14,205	11,576	10
215	Utah State University	Utah	1	1	15,155	9,794	11,071	4
216	Utah Valley State College	Utah	1	1	7,879	10,795	9,267	5
217	Weber State University	Utah	1	1	13,449	7,163	7,821	7
218	George Mason University	Va.	1	1	20,308	10,580	13,600	28
219	James Madison University	Va.	1	1	11,251	6,521	8,702	11
220	Northern Virginia Community College	Va.	1	2	35,194	16,297	20,358	40
221	Old Dominion University	Va.	1	1	16,729	8,265	10,608	29
222	Tidewater Community College	Va.	1	2	17,726	7,873	11,151	36
223	University of Virginia, Main Campus	Va.	1	1	21,110	9,880	12,553	18
224	Virginia Commonwealth University	Va.	1	1	21,764	9,248	14,233	30
225	Virginia Polytechnic Institute and State U.	Va.	1	1	25,568	16,451	11,459	13
226	University of Washington, Seattle	Wash.	1	1	33,854	17,243	18,316	31
227	Washington State University	Wash.	1	1	18,412	10,116	10,683	14
228	Marshall University	W.Va.	1	1	12,407	7,025	8,608	6

Line no.	Institution	State	Control <sup>1</sup>	Type <sup>2</sup>	Total enrollment fall 1990	Enrollment, by sex, fall 1999		Percent minority enrollment, 1999 <sup>3</sup>
						Men	Women	
229	West Virginia University	W.Va.	1	1	20,854	11,187	11,128	7
230	Milwaukee Area Technical College	Wisc.	1	2	21,600	8,631	9,724	33
231	University of Wisconsin, Madison	Wisc.	1	1	43,209	19,386	20,713	10
232	University of Wisconsin, Milwaukee	Wisc.	1	1	26,020	10,227	12,922	17

—Not applicable.

<sup>1</sup>Publicly controlled institutions are identified by a “1;” private, not-for-profit, by a “2;” and private, for-profit, by a “3.”

<sup>2</sup>The types of institutions are identified as follows: “1” for 4-year institutions; and “2” for 2-year institutions.

<sup>3</sup>Proportion based on enrollment of U.S. citizens.

<sup>4</sup>Due to changes in survey instruments, public colleges are to report data on current-fund expenditures and educational and general expenditures, and private colleges are to report data on total expenditures.

<sup>5</sup>Data for totals of enrollment in 1990 and 1995 are for institutions of higher education, rather than degree-granting institutions.

<sup>6</sup>Data imputed using alternative methods. (See Guide to Sources for details.)

<sup>7</sup>Data not available.

<sup>8</sup>Data not reported.

SOURCE: U.S. Department of Education, National Center for Education Statistics, Integrated Postsecondary Education Data System (IPEDS), “Completions,” “Finance,” and “Fall Enrollment” surveys. (This table was prepared September 2001.)

### Appendix B. Segregation by Law in Education—1950<sup>84</sup>

	Constitutional Provisions	Statutes	Public Schools	Schools for Blind	Agricultural Schools	Colleges/Universities	Separate Schools for Indians, Asians, Mexicans	Prisons	Mixed-Marriage Laws: Miscegenation
Alabama	√	√	√		√	√		√	√
Alaska									
Arizona		√	√						√
Arkansas		√	√	√	√	√		√	√
California									√
Colorado									√
Connecticut									
Delaware	√	√	√			√	√		√

84. PAULI MURRAY, *STATES' LAWS ON RACE AND COLOR 704* (1950). Murray's book is a compilation of laws regarding race or color as of 1950.

	Constitutional Provisions	Statutes	Public Schools	Schools for Blind	Agricultural Schools	Colleges/Universities	Separate Schools for Indians, Asians, Mexicans	Prisons	Mixed-Marriage Laws: Miscegenation
District of Columbia									
Florida	√	√	√	√	√	√		√	√
Georgia	√	√	√		√	√		√	√
Hawaii									
Idaho									√
Illinois									
Indiana									√
Iowa									
Kansas		√	√						
Kentucky	√	√	√	√	√	√			√
Louisiana	√			√	√	√		√	√
Maine									
Maryland		√	√			√			√
Massachusetts									
Michigan									
Minnesota									
Mississippi	√	√	√	√	√	√	√	√	√
Missouri	√	√	√		√	√			√
Montana									√
Nebraska									√
Nevada									√
New Hampshire									
New Jersey									
New Mexico		√	√						
New York									
North Carolina	√	√	√	√	√	√	√	√	√
North Dakota									√
Ohio									
Oklahoma	√	√	√	√	√	√			√

	Constitutional Provisions	Statutes	Public Schools	Schools for Blind	Agricultural Schools	Colleges/Universities	Separate Schools for Indians, Asians, Mexicans	Prisons	Mixed-Marriage Laws: Miscegenation
Oregon									√
Pennsylvania									
Rhode Island									
South Carolina	√	√	√		√	√		√	√
South Dakota									√
Tennessee	√	√	√	√	√	√		√	√
Texas	√			√	√	√			√
Utah									√
Vermont									
Virginia	√	√	√	√		√		√	√
Washington									
West Virginia	√	√	√	√	√	√			√
Wisconsin									
Wyoming		√	√						√

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