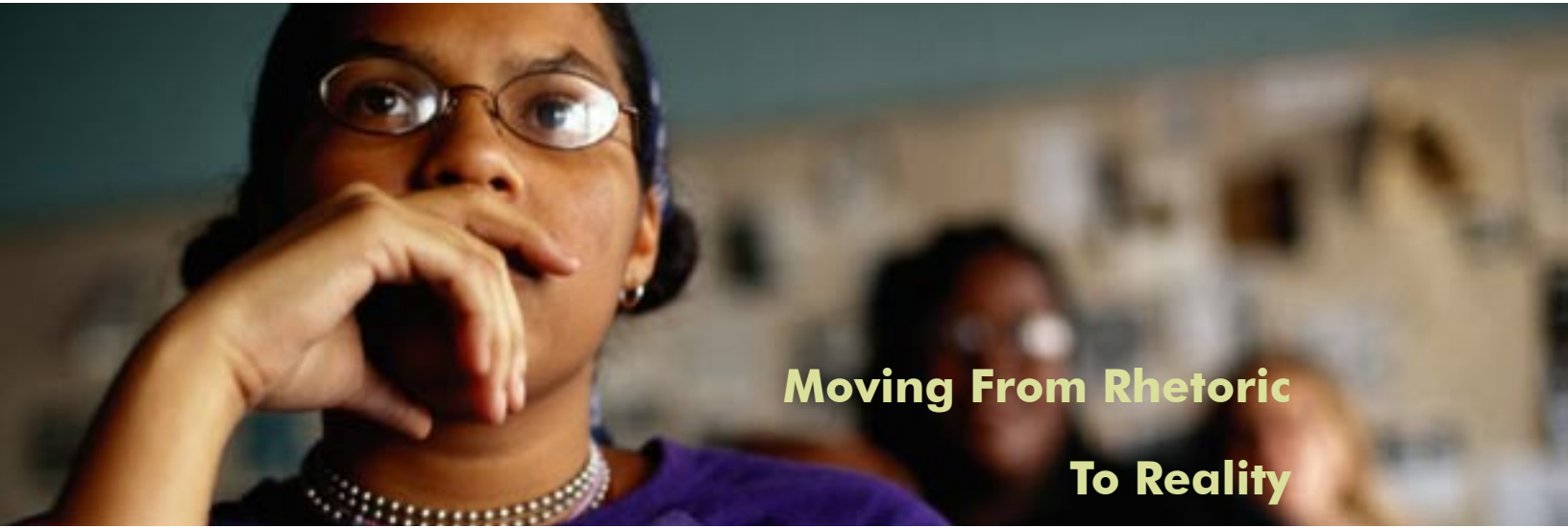


CLOSING THE GAP



**Moving From Rhetoric
To Reality**

**In Opening Doors
To Higher Education
for African-American Students**

June 23, 2005



A Report by the
NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.



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The NAACP Legal Defense and Educational Fund, Inc. (LDF) was founded in 1940 under the leadership of Thurgood Marshall, who subsequently became the first African-American U.S. Supreme Court Justice. Although initially affiliated with the National Association for the Advancement of Colored People, LDF has been an entirely separate organization since 1957.

LDF's mission is to transform the promise of equality into reality for African Americans and, ultimately, all individuals in the areas of education, political participation, economic justice and criminal justice. Through litigation, advocacy and public education and outreach, LDF works to secure equal justice under law, to promote the full social, economic and cultural integration of all Americans into our society, to ensure social justice and to break down the barriers that prevent the most vulnerable among us from realizing basic civil and human rights. Fifty years after *Brown v. Board of Education*, education is still LDF's main program area. LDF continues to play a major role in the decades-long struggle to win equal access to primary, secondary and higher education for all of our nation's youth.

INTRODUCTION

THE LIVED REALITIES OF BLACKS AND WHITES

"Our progress as a nation can be no swifter than our progress in education."

John Fitzgerald Kennedy¹

By any measure, there is a vast gap between African Americans and whites in how they live, work, and reside in America.² The depth and breadth of this gap, at least with respect to educational achievement, may be best expressed by the following statistics:

If you are an African American 25 years of age or older, you are more likely to be without a high school diploma than you are to have a college degree. Conversely, if you are white and in the same age group, you are nearly three times as likely to have a college degree than you are to be without a high school diploma.³

A person's educational attainment level affects his or her job prospects, where he or she is able to live and what kind of life he or she will have while residing there. This nation must act decisively to ensure that African-American children graduate from high school and go on to college. We cannot make "progress as a nation" unless we do.

Two years ago, in *Grutter v. Bollinger* and *Gratz v. Bollinger* (together, the "Michigan cases"), the United States Supreme Court cleared a path for colleges and universities to ensure access to higher education for African Americans and other students of color. The Court understood that "[b]y virtue of our

Nation's struggle with racial inequality, such students are both likely to have experiences of particular importance to [a higher institution's] mission, and less likely to be admitted in meaningful numbers on criteria that ignore those experiences."⁴ Reaffirming the transformative vision of racial equality that it promulgated fifty years earlier in *Brown v. Board of Education*, the Supreme Court insisted that closing the opportunity gaps for African Americans and other minorities is an American imperative: "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."⁵ Indeed, a national consensus of members of both major political parties, educators, business leaders, and Americans from all walks of life consider the black-white achievement gap a critical issue that must be addressed.

Nevertheless, anti-affirmative action groups have not retreated in the wake of their resounding defeat in *Grutter* and *Gratz*. Instead, they have redoubled their efforts to undermine the Supreme Court's seminal decisions. They are zealously seeking to eliminate policies and programs that expressly assist African-American students and other students of color. Sadly, the Office for Civil Rights ("OCR") in the U.S. Department of Education ("DOE") is facilitating this effort. The DOE's involvement is particularly ironic considering that it has spearheaded the federal government's efforts to "leave no child behind" and has required schools around the country to record racial data to ensure that students of all races receive the intended benefits of the law.⁶ While no one is suggesting that racial inequality can and should be addressed solely through race-conscious means, there is no basis – legal or otherwise – for limiting the nation's options so that race-conscious measures can never be considered. By its very nature, the only way a racial gap can be closed completely is through racial means.

As this nation rightfully celebrates the second anniversary of the Michigan cases, the NAACP Legal Defense & Educational Fund, Inc. (“LDF”) releases this Report as a reminder of the challenge provided by the Court and the work left ahead for us all. LDF surely recognizes that the underlying causes of racial gaps in educational opportunity and achievement are multi-faceted and that the solution must be equally comprehensive. Beginning with the inspirational work of Charles Hamilton Houston and Thurgood Marshall, LDF has spent over six decades at the forefront of the struggle to address racial inequalities at all levels of our education system and in numerous other contexts, including employment, criminal justice, and voting rights. In this Report, we focus on higher education. If the gap in college enrollment and graduation persists, we risk losing a generation of African-American youth. Such a loss is simply unacceptable.

PART I both describes and defines the depth of the black-white achievement gap and places this gap within a broader societal context – one that requires this nation’s immediate attention.

PART II documents how this nation is truly concerned about and uniquely united on closing the racial gap in educational achievement.

PART III details how the relentless assault on affirmative action by groups opposed to its use has hindered efforts to ensure access to higher education for all and, thereby, close achievement gaps. It also analyzes the support that these anti-affirmative action groups have received from the federal government by OCR. As we explain further below, the well-organized anti-affirmative action campaign in the wake of the Michigan cases parallels in many respects the massive resistance of Southern segregationists who refused to comply with *Brown*.

PART IV explains how this assault is a clear and present danger to any legitimate effort to move this nation forward and close the gap in black-white achievement.

In short, this Report is about more than one gap. There is the gap between the rhetoric of anti-affirmative action groups on the one hand and the law as stated by the Supreme Court on the other. There is the gap between the federal government’s



professed concern for closing the racial achievement gap on the one hand and its decision to limit the options of institutions trying to do so on the other. Until we close these two gaps, this nation will have a difficult time successfully tackling the more difficult and complex problem of closing the gap between the lived realities of blacks and whites.

PART I

THE MILLION DOLLAR GAP:

CALCULATING THE COSTS OF THE BLACK-WHITE ACHIEVEMENT GAP

AND THE BENEFITS TO ADDRESSING IT

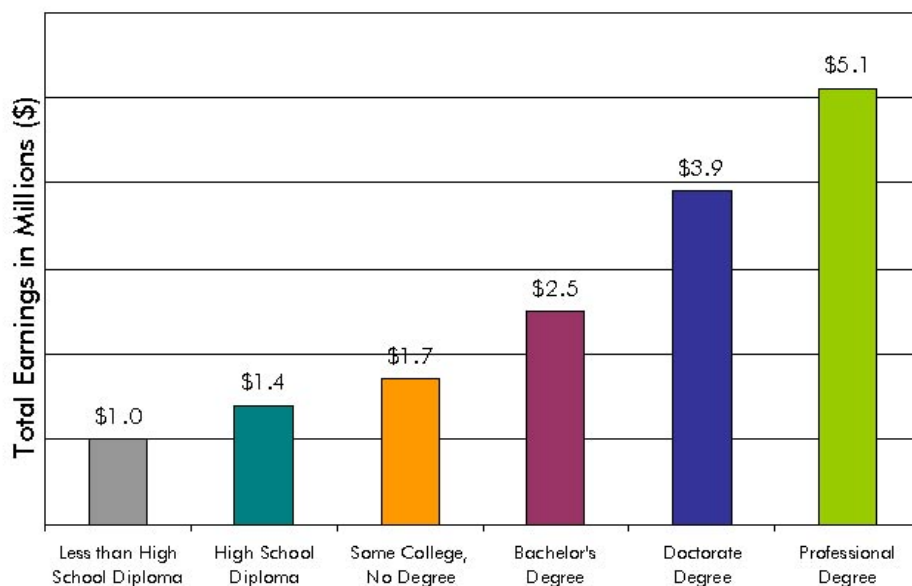
"In this world under threat, colleges and universities remain our best hope. We depend on you for leaders who care for, are engaged in and will serve the community, who are schooled deeply and broadly, in all corners of knowledge. We depend on you to point us toward solutions to our problems. That is what our scholars and teachers and students have always done, must always do, for no one else will."

Nelson Mandela⁷

Higher education unlocks doors to economic, social, and civic opportunities. Moreover, in a world that is increasingly reliant upon advanced, information-based technologies, continued U.S. economic growth will require a highly-educated workforce. According to the Secretary of Education, "[e]ighty percent of the fastest-growing jobs of the 21st century require post-secondary education or training."⁸ If so, there is a crisis of epic proportions in the African-American community.

With more high school dropouts than college graduates, African Americans over the age of 25 are not well-positioned

to take advantage of what this nation's economy has to offer. Over their lifetime, college graduates are expected to earn nearly one million dollars more than high school graduates.⁹ Obviously, for those without a high school diploma, this earnings gap will be even larger. College graduates earn more than twice as much as high school dropouts. In 2003, the median earnings of a college graduate were \$53,020. In that same year, the median earnings for those without a high school diploma were \$23,099.¹⁰ Furthermore, according to the Center for Labor Market Studies at Northeastern University, the real income of those without a high school diploma is less today than it was in 1973.¹¹ If we don't close the gap, these already



EXPECTED LIFETIME EARNINGS

Total expected lifetime earnings based on the sum of the mean annual 2003 earnings of persons aged 25 to 64.

Source Sandy Baum and Kathleen Payea, *Education Pays 2004: The Benefits of Higher Education for Individuals and Society* (College Board, 2004).

monumental differences in earnings will become even more pronounced.

Education is particularly critical for employment among black workers. Economist Derek Neal notes: "It is clear that the relationship between employment and education is much stronger among black workers than white workers. This was also true in 1980 and 1990, but the strength of the relationship between education and employment rates among black men has grown dramatically over time."¹² Reinforcing Neal's point, although unemployment rates are dramatically lower overall among individuals with higher levels of educational attainment, the differences are greatest among blacks: 13.9% of blacks without a high school diploma are unemployed compared to 9.3% of black high school graduates and 4.5% of blacks with a bachelor's degree or higher.¹³ In other words, without a high school and/or college diploma, employment prospects for black workers are dismal.

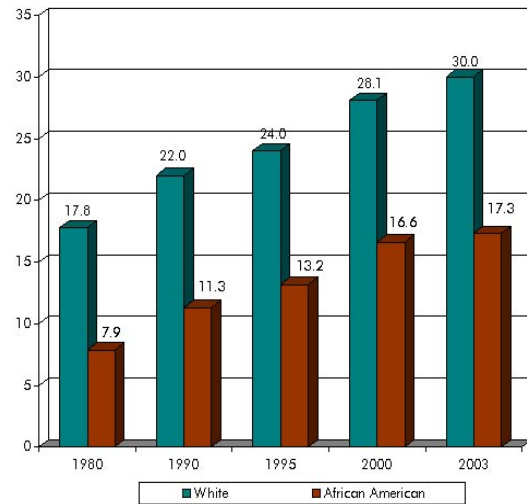
Beyond dramatically increasing individual earning power and economic opportunity more generally, a higher level of educational attainment has also been linked with greater life satisfaction and psychological well being.¹⁴ According to a report recently issued by the College Board, college graduates are more likely to report that they are in excellent or very good health and are less likely to smoke than high school graduates or those without a high school diploma. For example, in 2001, among those aged 35 to 44, 84% of college graduates reported that they were in excellent or very good health as compared to 51% of those without a high school diploma.¹⁵

College graduates also exhibit higher levels of civic participation and lower incarceration rates. In 2004, among eligible voters between the ages of 25 and 44, college graduates (68.7%) voted in significantly higher percentages than high school graduates (43.3%) or those without a high school diploma (21.2%).¹⁶ Approximately 1.9% of adults without a high school diploma were incarcerated in 1997, as compared to 0.1% of college graduates.¹⁷ Overall, a better-educated workforce leads to numerous societal benefits, including reduced crime, improved social cohesion, and increased economic and technological productivity.¹⁸

Thus, it is in our nation's interest to increase dramatically the number of African Americans receiving college degrees. It is also a moral imperative. Fifty years after *Brown* outlawed legal segregation, America is still struggling to overcome its long and tragic history of racial apartheid. This history has contributed, in significant part, to the black-white achievement gap. According to one recent estimate, in the absence of slavery, *de jure* segregation, and persistent discrimination, the current generation of African-American college applicants might have lived in a society where 700,000 more African Americans have jobs, and nearly two million more African Americans hold higher paying and managerial jobs. They might have lived in a

society where the average African-American household earns 56% more than at present, and altogether, African-American households earn another \$190 billion. Two million more African Americans could have high school diplomas, and nearly two million more could have undergraduate degrees.¹⁹

COLLEGE DEGREE PERCENTAGE RATES



Percentage of population 25 years or older who completed four or more years of college. **Source** American Council on Education, *Minorities in Higher Education: Twenty-First Annual Status Report (2003-2004)*.

In assessing the basis for the million dollar gap today, we must first address the obstacles to African Americans receiving college degrees and the gaps relating to college preparation, college enrollment, college retention, and finally, college graduation rates.

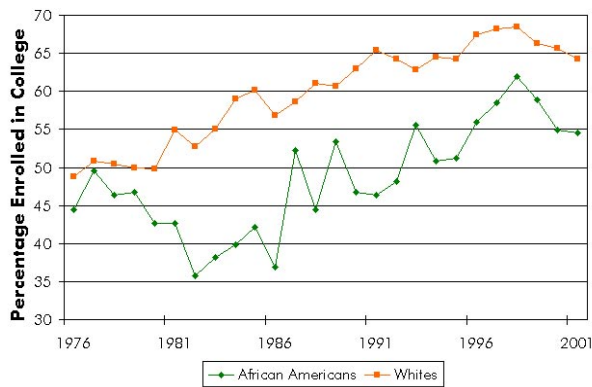
COLLEGE PREPARATION

Many black students, regardless of their family income, have markedly diminished opportunities for educational, social, and economic advancement.²⁰ The average African-American student attends segregated, high-poverty elementary and secondary schools²¹ that tend to have less-qualified teaching staff, deteriorating facilities, fewer up-to-date textbooks, lower average test scores, and fewer advanced placement courses.²² Further exacerbating the racial inequities, African-American students are over-represented in special education classes and low-track placements, but under-represented in gifted and talented programs.²³ African-American students are also suspended far more frequently.²⁴

In comparison to their white peers, African-American students are also far less likely to have access to college information and resources within their families or communities.²⁵ As one researcher notes, 39% of African Americans who enroll in col-

lege are first-generation college students.²⁶ In addition, minority and low-income students are least likely to receive information about college options early enough in their school careers to make a difference.²⁷ Moreover, African-American students typically attend schools that are unable to provide resources to fill the gaps in parental knowledge of, and familiarity with, the college preparation process. Whereas the national average ratio of students to guidance counselors is 490:1, the ratio can be 1056:1 or higher in schools serving large numbers of minority and low-income students.²⁸

COLLEGE ENROLLMENT OF 18-24 YEAR OLD HIGH SCHOOL GRADUATES, 1976-2001



Source U.S. Department of Education, National Center for Educational Statistics, Digest of Education Statistics 2002, Table 183.

COLLEGE ENROLLMENT

Although the number of black students enrolling in college is increasing, black high school graduates are much less likely than their white peers to enter college within a year of graduation.²⁹ Only 55% of African-American high school graduates are enrolling in college immediately after high school in comparison to 64% of white students.³⁰

COLLEGE RETENTION

Equally of concern is the high attrition rate of black college students. Among African-American students who enrolled in four-year colleges in 1995-96, only 36.4% attained a bachelor's degree in five years, as compared to 58.0% of white students.³¹ Nearly one-third of African-American students (30.1%) dropped out.³² Even as African-American college enrollment is rising, college degree attainment has remained flat. Minority students remain "less likely [than white students] to start or finish college and are more likely to attend low prestige colleges or those with the highest dropout rates."³³

ACADEMIC SUPPORT

Lower retention and graduation rates among black students have been linked to a variety of factors including negative racial climates, racial isolation and alienation, and low educational expectations.³⁴ In addition, the high level of attrition in college generally, and among black students in particular, clearly indicates the need for academic support programs.³⁵ Despite this critical need, these academic support programs are increasingly nonexistent, understaffed, or underfunded.³⁶

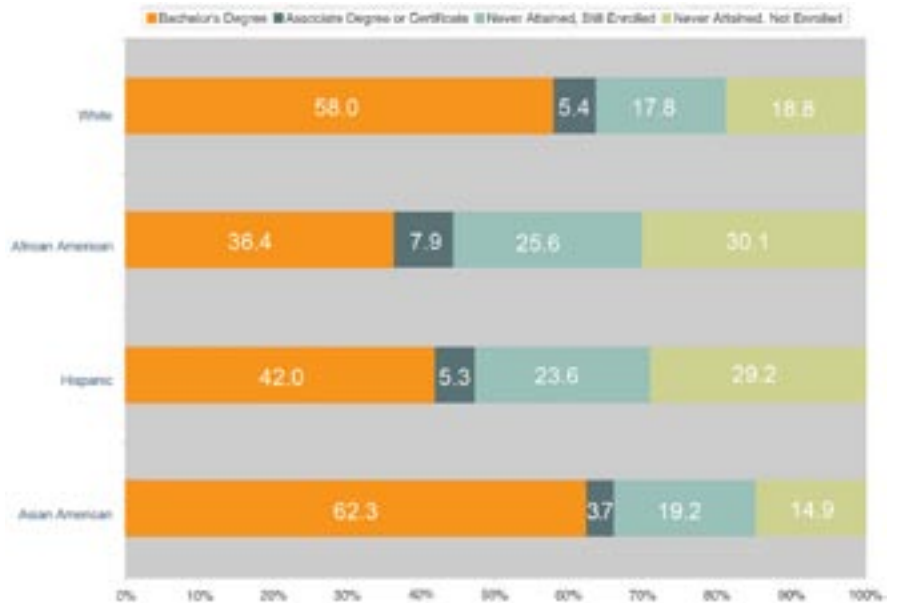
FINANCIAL NEED

Even for African-American students who are academically prepared, college costs present a significant obstacle to enrolling in and graduating from college. Overall, college education costs are rising, while financial support for college is declining.³⁷ Unmet financial need for high-income and low-income families was roughly equivalent in 1974-75 but has since doubled for low-income families (but stayed the same for high-income families).³⁸ The costs of attending college are a growing barrier for these minority students, who are far more likely to come from low-income families than their white peers.³⁹ Among 1992 high school graduates, 54% of African-American students were low-income as compared to 21% of white students.⁴⁰

COLLEGE GRADUATION RATES

The nationwide college graduation rate for black students hovers around 40%, compared to 60% for white students,⁴¹ and "that gap has not closed at all over the last fifty years."⁴² In fact, the differences in completion rates have increased since the early 1990s.⁴³ By their late twenties, 34% of white students

COLLEGE DEGREE ATTAINMENT RATES

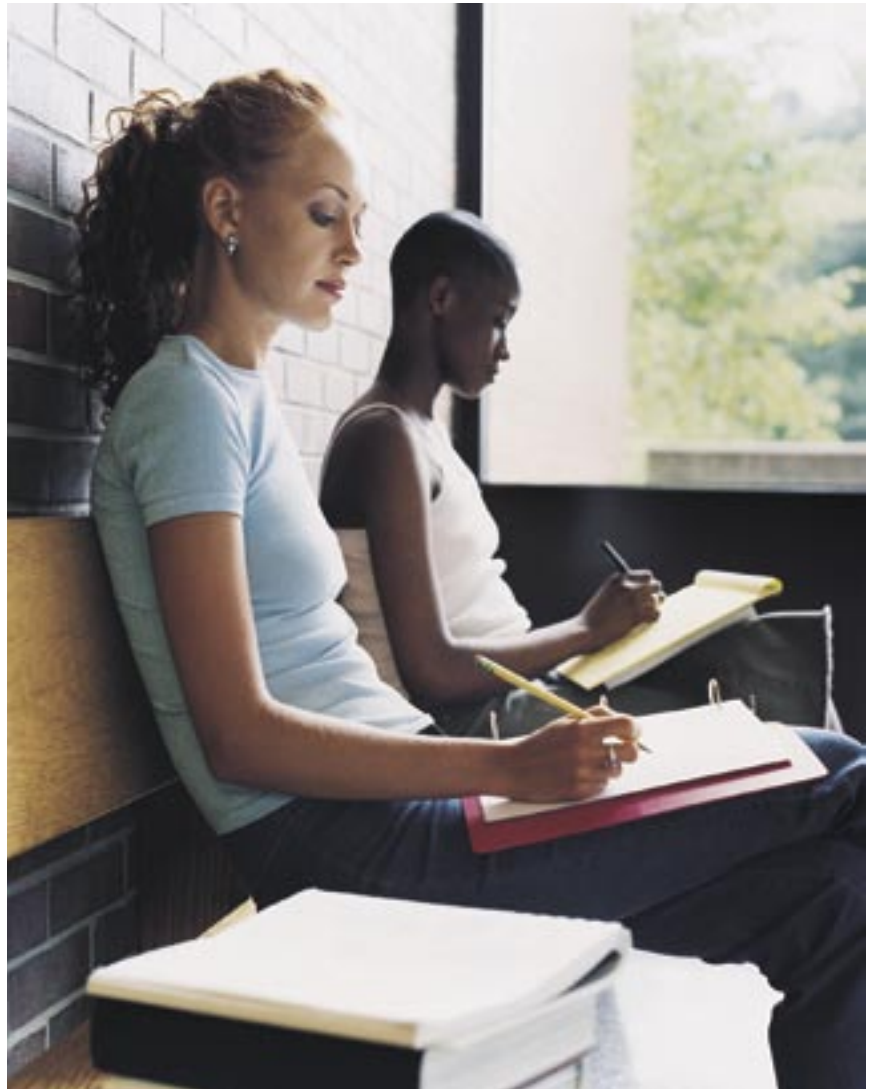


Reflects status of degree seeking students who enrolled in 1995-96, five years after they enrolled.

Source American Council on Education, Minorities in Higher Education: Twenty-First Annual Status Report (2003-2004).

have attained at least a bachelor's degree compared to 18% of African-American students.⁴⁴ There are similar gaps in African-American enrollment, retention, and graduation at graduate and professional schools.⁴⁵

While the depth and the breadth of this achievement gap is considerable, addressing this problem is certainly worth the nation's time and resources. A 1999 RAND Corporation study quantified the positive impact of "full equalization" – closing the black-white gap in educational attainment in high school graduation, college access, college retention, and college graduation.⁴⁶ The benefits the study measured – including long-term savings in public expenditures for income transfer and social programs like Medicaid and welfare, increased tax revenues and social security contributions, and increased disposable income – vastly outweigh the increased expenditures necessary to expand the educational capacity of postsecondary institutions.⁴⁷ Moreover, according to the RAND scholars, the benefits do not take long to be realized: the costs of closing the educational attainment gap for any student "could be recouped within a decade or so" of his or her college graduation.⁴⁸



PART II

AMERICA UNITED:

A NATIONAL CONSENSUS FOR ACTION ON THE BLACK-WHITE

ACHIEVEMENT GAP

“So long as there is an achievement gap, we’ve got more work to do.”⁴⁹

George W. Bush, President of the United States

“In district after district, wealthy white kids are taught Algebra II, while low-income minority kids are taught to balance a checkbook! The first group goes on to college and careers; the second group will struggle to make a living wage.”⁵⁰

Bill Gates, Founder and Chairman of Microsoft Corporation

Everyone is talking about the “gap.”⁵¹ It is widely recognized by business, political, and educational leaders that our nation currently denies many of our young people a meaningful opportunity to attend college or university, much less graduate or professional school. While Americans may be divided by race in where and how they live, there is a clear consensus that the gap in the levels of access, opportunity, achievement, and expectations between black and white children in this country, outlined in Part I, needs to be closed. Indeed, eighty-eight percent of the American public considers the closing of the minority achievement gap to be of national importance.⁵²

Closing the race-based achievement gap has been continually touted as a principal basis for the federal government’s support of the “No Child Left Behind Act” (“NCLB”):

Senate Majority Leader Bill Frist: “No Child Left Behind rejects the acceptability of an ‘achievement gap.’ It means that all students deserve equal access to quality educational experiences: your race, income level or zip code should not deprive anyone of this opportunity. And by holding schools accountable for the academic progress of every single child, No Child Left Behind seeks to end this disparity.”⁵³

President George Bush: “In order to make sure people have jobs for the 21st century, we’ve got to get it right in the education system, and we’re beginning to close a minority achievement gap now.”⁵⁴

Although there are serious questions as to whether NCLB overall will benefit African-American children, this law appropriately mandates that student performance data be disaggregated by race and ethnicity.⁵⁵

Closing the achievement gap is also at the core of the Supreme Court’s decisions in the Michigan cases. Significantly, the Supreme Court in *Grutter* recognized that the very health of our democracy, the economic vitality of American businesses,⁵⁶ and, indeed, our national security⁵⁷ hinge on our ability to provide access to higher education for all, regardless of race and ethnicity. As a result, the Court granted colleges and universities latitude to use race in order to ensure access to higher education to all.⁵⁸ The decision reflected an acute understanding of the reality of race in America today.

The Court listened to business leaders who stressed that affirmative action is critical to the nation’s economic future:

In the practical experience of the *amici* businesses, the need for diversity in higher education is indeed compelling. Because our population is diverse, and because of the increasingly global reach of American businesses, the skills and training needed to succeed in business today demand exposure to widely diverse people, cultures, ideas and viewpoints. Employees at every level of an organization must be able to work effectively with people who are different from themselves. *Amici* need the talent and creativity of a workforce that is as diverse as the world around it.⁵⁹

Nor could the Court ignore the power of the brief submitted to it by nearly 30 former military officers, including: Lt. Gen. Julius W. Becton, Jr., U.S. Army (1943-83), President of Prairie View A & M University (1989-94) and Superintendent of the Washington D.C. Public Schools (1996-98); Hon. Robert McFarlane, President Reagan's National Security Advisor (1983-85); Gen. Norman Schwarzkopf, Commander of Allied Forces during the Gulf War; Gen. Wesley Clark, Supreme Allied Commander (1997-2000); and the Hon. William Perry, President Clinton's Secretary of Defense (1994-97). The brief emphasized that the nation's security depended on the military's ability to close the gap between the overwhelmingly white officer corps and the disproportionately minority enlisted personnel by ensuring that more minorities became officers. "The fact remains: Today, there is no race-neutral alternative that will fulfill the military's, and thus the nation's, compelling national security need for a cohesive military led by a diverse officers corps of the highest quality to serve and protect the country."⁶⁰

The Court affirmed the work of those trying to close the racial gap: "In order to cultivate a set of leaders with legitimacy in

the eyes of the citizenry, it is necessary that the path to leadership be **visibly open** to talented and qualified individuals of every race and ethnicity."⁶¹ Indeed, the Court makes efforts to close the opportunity gaps for African Americans and other minorities an American imperative: "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."⁶²

The Supreme Court decisively rejected the claims of those who argued that these gaps can be closed solely by relying on race-neutral measures.⁶³ Echoing the sage words of Justice Blackmun in *Regents of the University of California v. Bakke* that "[i]n order to get beyond racism we must first take account of race,"⁶⁴ the Court was resoundingly clear that institutions of higher education may adopt race-conscious means within certain parameters to achieve a diverse student body.⁶⁵ In so doing, the Court affirmed the continuing significance of race in shaping educational and other opportunities in American society and endorsed a process for addressing the problems resulting from the nation's history of racial apartheid.



PART III

BLOCKING THE SCHOOLHOUSE DOOR REVISITED: THE RELENTLESS ASSAULT ON AFFIRMATIVE ACTION AND EFFORTS TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP

“Segregation now, Segregation forever.”⁴⁹

George Wallace, Governor of Alabama (1963)

The crusade by anti-affirmative action groups to block African Americans from institutions of higher education has historical precedent. Following the Supreme Court’s decision in *Brown v. Board of Education* in 1954, states around the country engaged in massive resistance to the Court’s desegregation mandate. Most notoriously, George C. Wallace, the governor of Alabama, vowed in his 1963 inauguration speech to uphold “segregation forever” under the auspice of states’ rights; he then stood in the door of the University of Alabama to block black students from registering.⁶⁷ History is now repeating itself, but with a twist: this time the assault is being led by small but vocal organizations that are determined to deny blacks full educational opportunities.

Despite the widely acknowledged crisis in African-American educational achievement, the national consensus that the gap needs to be closed, and the Supreme Court’s decisions in the Michigan cases authorizing both public and private educational institutions to address this crisis, anti-affirmative action forces have escalated their attacks on programs intended to increase access to and success in higher education by African Americans.⁶⁸ This relentless assault threatens the legitimate efforts by colleges and universities, among others, to close the gap. If it continues, these groups may succeed where former Governor Wallace failed—preventing significant numbers of African Americans from receiving higher education.⁶⁹

Ironically, these efforts are aided by and pursued with the support of the U.S. Department of Education’s Office for Civil Rights (“OCR”), a federal agency that was created to root out entrenched segregation in our nation’s educational system and that has repeatedly decried the existence of the black-white achievement gap. Even more disturbingly, these efforts seem

to have as their primary goal the subversion of the Supreme Court’s Michigan decisions.

Since the Michigan decision, anti-affirmative action groups have pressured colleges and universities to abandon explicitly race-conscious outreach and recruitment, financial aid and scholarships, and retention programs, in addition to their continued assault on admissions policies. Their strategy, as the *Chronicle of Higher Education* reports, is “to place colleges under public and political pressure to abandon race-conscious policies even if they are operating within the law.”⁷⁰ For example, in the year following the Michigan cases, more than 100 educational institutions received letters threatening that complaints would be filed with OCR if those institutions did not eliminate race as an eligibility criterion for a variety of programs.⁷¹

More recently, anti-affirmative action groups have sought to “expose” what they consider to be “covert” race-conscious programs by sending detailed information requests to colleges and universities for racial data on various admissions and outreach and recruitment, financial aid and scholarships, and retention programs. For public institutions, they have made use of state freedom of information laws in order to pressure colleges publicly to change their programs.⁷² Such attacks give the often misleading impression that universities are acting unlawfully when they are instead taking permissible steps to provide access and educational opportunities to African Americans and other minorities. For example, in 2004, the National Association of Scholars released a study criticizing North Carolina State University, University of Virginia, and William and Mary Law School. The study was then publicized and sent by another anti-affirmative action group to OCR as additional “evidence” about these institutions’ supposed improper practices.⁷³

Because by law OCR must investigate each and every complaint it receives,⁷⁴ the threat to file an OCR complaint can have a chilling effect on an educational institution, even if there is no merit to the complaint. In many instances where OCR has publicly announced an investigation, colleges and universities have decided not to engage in the time-consuming process of responding to an OCR investigation, regardless of the le-

gal merits of their programs. Instead, institutions have entered into settlements prior to the release of any formal findings by the government. Similarly, the threat that anti-affirmative action groups will file an OCR complaint has led colleges and universities to modify the structure, eligibility criteria, and focus of their financial aid, scholarships, and academic support programs, even if these modifications reduce program effectiveness, disadvantage program participants, or result in the elimination of the program altogether. Predictably, this hostile climate has severely dampened university efforts to attract a diverse group of students and has depressed minority enrollment.⁷⁵

OCR has not been merely a passive player in the intimidation strategy of the anti-affirmative action groups. Anti-affirmative action groups have an inside track at OCR. OCR has recently hired staff who previously worked for the anti-affirmative action group that represented the plaintiffs in *Gratz* and *Grutter*.⁷⁶ Moreover, in a *Chronicle of Higher Education* article, a spokesperson for one of the anti-affirmative action groups provided what appeared to be non-public “inside information” about what OCR was doing, commenting that “the civil-rights agency was still evaluating the complaints and had not decided whether to undertake formal investigations.”⁷⁷

Moreover, OCR has focused its energies on encouraging educational institutions to pursue race-neutral alternatives, even though such policies are insufficient by themselves to close the gaps in African-American college enrollment and graduation, as discussed further below.⁷⁸ In 2004, OCR issued a report entitled *Achieving Diversity* that catalogued various race-neutral alternatives being employed nationwide.

Yet OCR’s narrow focus on race-neutral alternatives runs counter to the dictates of the Supreme Court in the Michigan cases. While race-neutral alternatives must be considered, the Court does not require institutions to exhaust every race-neutral alternative and made clear in *Grutter* that particular strategies, such as the percentage plans in California, Texas and Florida touted by OCR, were not always preferable to race-conscious policies. In fact, the Court in *Grutter* said that such plans “may preclude the university from conducting the individualized assessments necessary to assemble a student body that is not just racially diverse, but diverse along all the qualities valued by the university.”⁷⁹

In short, *Grutter* recognizes the need for, and gives deference and flexibility to, colleges and universities to use a broad array of tools, including race-conscious policies, to create student diversity.⁸⁰ Notably, a solid majority of six Justices endorsed this view.⁸¹ Thus, the Court decisively supported efforts by institu-

tions of higher education to bolster the participation of minority students, and thereby provide training to future national leaders, enhance the legitimacy and effectiveness of critical government institutions, and contribute to desegregating a core realm of civic life. Race-conscious support programs play a critical role in opening the doors to higher education for minority students and in keeping those doors open.

Nevertheless, in the wake of their decisive defeat, anti-affirmative action groups are trying to achieve through threats and intimidation what they could not achieve through the courts, just as was done following *Brown*. Anti-affirmative action groups ignore *Grutter* and instead focus on the companion decision in *Gratz*. The *Gratz* ruling struck down an undergraduate admissions process at the University of Michigan that mechanically allocated points to minority applicants on the basis of race.⁸² OCR and its supporting cast would have colleges and universities believe that *Gratz*, with its limiting language regarding the use of race in admissions at the University of Michigan, set forth the parameters for considering race in other contexts and bars all race-targeted measures.

This is incorrect. *Gratz* did not address, much less prohibit, considerations of race outside the admissions context. Moreover, OCR’s own 1994 Title VI Policy Guidance expressly contemplates that universities may provide race-targeted scholarships and financial assistance if such aid is connected to the university’s overarching diversity mission and is otherwise narrowly tailored.⁸³ This guidance, which has never been rescinded, indicates that universities may similarly rely on other kinds of race-targeted support programs without violating Title VI.⁸⁴ Furthermore, the courts have yet to rule definitively on the permissible limits of affirmative action in the higher education context of outreach and recruitment, financial aid and scholarships, and retention programs for purposes of diversity. Again, as OCR’s 1994 Policy Guidance suggests, such race-targeted tools may be critical to creating and preserving diversity among the student body.⁸⁵ Indeed, it was for such reasons that the First Circuit Court of Appeals recently upheld a K-12 school district’s student transfer policies, which were based entirely on racial considerations.⁸⁶

In sum, *Gratz* did not sweep as broadly as the anti-affirmative action groups claim. But the larger point is this: colleges and universities should be permitted to use aggressive means in the realm of outreach and recruitment, financial aid and scholarships, and retention programs, because such programs are essential for closing the gap and further enhance university efforts to achieve student diversity.

HYPOTHETICAL RACE-CONSCIOUS PROGRAMS

The following hypotheticals provide a sample of the types of programs that anti-affirmative action groups have opposed despite their critical importance in closing gaps in educational opportunities for African Americans.

ADMISSIONS PROGRAMS: A school provides minority applicants an opportunity to provide further information about the role that race or ethnicity played in their lives; the information is considered as one component of an admissions procedure that involves a highly individualized review of every applicant's file.

ON-CAMPUS SUPPORT PROGRAMS: Despite continual efforts by administrators and faculty, a significant gap in the retention and graduation rates of black and white students persists at a large university. While the university has long provided academic support (i.e., tutoring and mentoring) programs for all students, the university decides to adopt additional academic support programs targeted toward black students in order to reduce the retention and graduation rate gap and maintain a critical mass of students on campus.

SCHOLARSHIP PROGRAMS: A small college campus designs a scholarship program to recruit and retain additional black students, who currently constitute a tiny fraction of the student population. A limited pool of funds is available for this scholarship, which is provided to students with unmet financial need. Eligible non-black students vastly outnumber eligible black students. Increasing the number of recipients would require a reduction in the scholarship amount, thereby diluting its impact. If the scholarship amount were held constant, opening up the scholarship program to non-black applicants would ensure that few, if any, black students received scholarships, and thwart the college's efforts to achieve critical mass.



PART IV

RACE MATTERS:

IN THE PROBLEM AND THE SOLUTION

“In order to get beyond racism, we must first take account of race. There is no other way.”⁸⁷

Harry Blackmun, Associate Justice
U.S. Supreme Court (1970-94)

To recognize that “the racial gap is real”⁸⁸ and “the achievement gap is a national problem”⁸⁹ and to then intensify efforts to take race off the table and continue the onslaught against race-conscious strategies reflects a profound hostility towards the very goal of closing the gap. The attacks on race-conscious programs undermine the ability and authority of educational institutions to eliminate the vestiges of our nation’s history of racial apartheid and to guarantee equality of educational opportunity; in fact, these attacks may well exacerbate the gap.

It is inconsistent, at best, for the federal government to preach to the nation about closing the achievement gap between blacks and whites and then threaten to cut off the federal funds of educational institutions that are trying to make sure qualified African-American children receive a college education and are not consigned to a life of poverty or underemployment. OCR seems to treat the race gap like a poster child, whom they take around and show off, but ultimately forget and leave behind.

The singular pursuit of race-neutral measures by the federal government might deserve more credence, if it was not undermining these programs as well. In *Achieving Diversity*, OCR’s guide on race-neutral alternatives, OCR touted Upward Bound, Talent Search, and Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP) as laudable and effective federal efforts that can “serve as models for state and local governments that want to expand their own race-neutral efforts.”⁹⁰ Nevertheless, instead of increasing funding for these programs, which provide early intervention and pre-college outreach services to over 1.8 million first-generation and low-income students, the White House’s Fiscal Year 2006 budget proposal completely eliminated funding for each of them.⁹¹ As the following studies indicate, we cannot close the black-white achievement gap without taking race into account. Race

matters in the distribution of opportunity, irrespective of other factors such as socioeconomic status and school environment.⁹² From their studies of socioeconomic status and race in higher education, Anthony Carnevale and Stephen Rose conclude that if universities limited their recruitment to students with low socioeconomic status, the proportion of minority students in higher education would decrease.⁹³ A recent study by Princeton sociologists concludes that “eliminating affirmative action would reduce acceptance rates for African-American and Hispanic applications by as much as one-half to two-thirds and have an equivalent impact on the proportion of underrepresented minority students in the admitted class.”⁹⁴ Likewise, in his most recent book, William Bowen notes that class-based affirmative action cannot replace “race-sensitive policies,” since the elimination of race-sensitive admissions “would cause the share of undergraduate students who are underrepresented minorities to fall by half.”⁹⁵

Moreover, using race explicitly as part of a comprehensive strategy to close the black-white achievement gap is just plain common sense. For decades, educational opportunities in much of the United States were explicitly and exclusively allocated on the basis of race, a practice which began to crumble with the *Brown* decision, but proved to be extremely resilient. Consequently, you cannot increase the rate at which African Americans receive college degrees to the same level as that of whites simply by providing the exact same amount of assistance to whites and blacks and nothing more. Certainly, race-neutral solutions to this problem will benefit some blacks, but they will not address the fundamental issue of inequality.

The path to equal educational opportunity is not easy. The failure to use every resource at our disposal will make that path nearly insurmountable. While race should be used carefully, it cannot be taken off the table. Not yet. Race has been and re-

mains a key factor in the perpetuation of educational inequality; race-conscious strategies therefore must be permissible tools for promoting racial opportunity and equality.

Colleges and universities need room to be bold in their commitment to a comprehensive strategy to close the gap. This is no time for business as usual. There is serious work to be done to prepare all students to be active and successful participants in

the 21st century. Colleges and universities must be supported, not hindered, in their efforts to take affirmative steps to address the racial inequalities that continue to inhere in American society today. They must have the freedom to establish programs that take account of race in order to best recruit and educate our nation's youth. A broad and comprehensive range of programs is critically necessary to close the indisputable racial gap in educational achievement and access.

CONCLUSION:

CLOSING WORDS ON CLOSING THE GAP

"Race has been so pervasive in our society that none, regardless of wealth or position, has managed to escape its impact."⁹⁶

Thurgood Marshall, Associate Justice, U.S. Supreme Court (1967-91)

Forty years ago, then-President Lyndon Baines Johnson recognized the challenges involved in closing racial gaps. He insisted: "It is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates."⁹⁷

Education provides the key to opening gates of opportunity. It is a foundation of our democracy and the means for ensuring that every individual reaches his or her full potential. Moreover, for America to be prepared for the economic and other challenges facing it in the 21st century, there is no other alternative but to close the gap in educational achievement. Although some progress has been made in the fifty years since *Brown v. Board of Education*, it is beyond dispute that minority students, and especially African Americans, continue to suffer from inadequate K-12 education and particularly severe gaps in access to and graduation from higher education institutions. If we are to achieve our full potential as a nation, we must address this problem and not just with rhetoric, but with actions—actions that include using every available tool, even race-conscious ones.

Now it is time for everyone to commit to the serious work that needs to be done to close the gap.

ENDNOTES

1. John F. Kennedy, "Special Message to the Congress on Education," February 20, 1961, http://www.jfklink.com/speeches/jfk/publicpapers/1961/jfk46_61.html.

2. While this gap is most commonly discussed in terms of the difference between blacks and whites in educational performance or achievement, the gap is manifested in numerous other ways that have a pernicious impact on the life opportunities and experiences of African Americans. In 2003, the median income for black households was \$29,645, only 63% of the median income for white non-Hispanic households, which is \$47,777. Carmen DeNavas-Walt et al., *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, U.S. Census Bureau, Current Population Reports (Washington, D.C., 2004), 4. Blacks earn less than whites in virtually every occupational group. The unemployment rate for blacks is 2.4 times greater than the white unemployment rate, and blacks are twice as likely as whites to be in poverty. U.S. Bureau of Labor Statistics, *Usual Weekly Earnings of Employed Full-Time Wage and Salary Workers by Occupation, Sex, Race and Hispanic Origin, 2000 Annual Averages*, Office of Employment and Unemployment Statistics, Current Population Survey, 13-16, 25-28; U.S. Bureau of Labor Statistics, *Household Data: Annual Averages, Unemployed Persons by Marital Status, Race, Age and Sex*, <ftp://ftp.bls.gov/pub/special.requests/lf/aat24.txt>. African Americans lag far behind white Americans in overall wealth. Typical white households have an overall median net worth of nearly \$81,450 compared to \$8,000 for black households. Thomas M. Shapiro and Jessica L. Kenty-Drane, "The Racial Wealth Gap," in *Readings in Black Political Economy*, eds. Cecilia Conrad et al. (Dubuque, IA: Kendall-Hunt, 2004).

Furthermore, black/white segregation in housing – the market that determines one's schooling, peer groups, safety, jobs, insurance costs, public services, home equity, and, ultimately, wealth – "remains the most extreme" of all residential segregation. Janny Scott, "Rethinking Segregation Beyond Black and White," *New York Times*, July 29, 2001. "No other ethnic or racial group in the history of the United States has ever, even briefly, experienced such high levels of residential segregation." Douglas S. Massey, "Residential Segregation and Neighborhood Conditions in U.S. Metropolitan Areas," in *America Becoming*, Vol. 1, eds. Neil J. Smelser et al. (National Research Council, 2001), 399, 401.

3. U.S. Census Bureau, *Educational Attainment of the Population 25 Years Over by Sex, and Race and Hispanic Origin: March 2002*, <http://www.census.gov/population/socdemo/race/black/pp1-164/tab07.pdf>.

4. *Grutter v. Bollinger*, 539 U.S. 306, 338 (2003).

5. *Id.* at 332.

6. Although the reference to "no child left behind" was popularized by the No Child Left Behind Act, 20 U.S.C. § 6301 et seq., it has long been the motto of the Children's Defense Fund. See <http://www.childrensdefense.org>.

7. Nelson Mandela, "Address to Amherst College," New York, NY, May 12, 2005, <http://www.amherst.edu/news/mandela/speech.html>.

8. White House, "Strengthening Education and Job Training Opportunities," September 2, 2004, <http://www.whitehouse.gov/news/releases/2004/09/print/20040902-3.html>. Post-secondary education or training is critical to employment in six out of the 10 fastest-growing occupations. U.S. Bureau of Labor Statistics, "BLS Releases 2002-12 Employment Projections," February 11, 2004, <http://www.bls.gov/news.release/ecopro.nr0.htm>.

9. Sandy Baum and Kathleen Payea, *Education Pays 2004: The Benefits of Higher Education for Individuals and Society* (College Board, 2004), 45 (app. A, fig. 2), http://www.collegeboard.com/prod_downloads/press/cost04/EducationPays2004.pdf (citing Jennifer Cheeseman Day and Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, U.S. Census Bureau, Current Population Reports (Washington, D.C., July 2002), 23-210). The million-dollar gap is also discussed in William Bowen et al., *Equity and Excellence in American Higher Education* (Charlottesville: University of Virginia Press, 2005), 257.

10. U.S. Census Bureau, "Educational Attainment of People 25 Years and Over, by Total Money Earnings, Work Experience, Age, Race, Hispanic Origin and Sex," http://ferret.bls.census.gov/macro/032004/perinc/new03_000.htm. Earnings numbers are for full-time workers ages 25-64.

11. Bob Herbert, "The Young and The Jobless," *New York Times*, May 12, 2005.

12. Derek Neal, "Why Has Black-White Skill Convergence Stopped?" (Chicago, 2005), 22, <http://economics.uchicago.edu/dneal/handbook-econ-edu.pdf>.

13. "A Visual Essay: Blacks, Asians and Hispanics in the Civilian Labor Force," *Monthly Labor Review* 127(6) (2004): 75.

14. Ernest T. Pascarella and Patrick T. Terenzini, *How College Affects Students* (San Francisco: Jossey-Bass Publishers, 1991); William Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Princeton, NJ: Princeton UP, 1998).

15. Baum and Payea, *Education Pays*, 18.

16. U.S. Census Bureau, "Voting and Registration in the Election of 2004," Table 5, <http://www.census.gov/population/www/socdemo/voting/cps2004.html>.

17. Baum and Payea, *Education Pays*, 20 (fig. 11).

18. Georges Vernez et al., *Closing the Education Gap: Benefits and Costs* (RAND, 1999), <http://www.rand.org/publications/MR/MR1036>.

19. Franklin D. Raines, "What Equality Would Look Like," in *The State of Black America*, ed. Lee A. Daniels (New York: Urban League, 2002), 17, 20.

20. These inequalities also extend to the treatment of black and white youth in the criminal justice system. Young blacks who are arrested and charged with a crime are more than six times more likely to be sentenced to prison than similarly situated whites. Manning Marable, *The Great Wells of Democracy: The Meaning of Race in American Life* (New York: Basic Books, 2002), 158.

21. In 1996-97, approximately 35% of African-American students were enrolled in schools that were more than 90% non-white. Gary Orfield and John T. Yun, *Resegregation in American Schools* (Cambridge, MA: Civil Rights Project, 1999), 14 (tbl. 9), 16 (tbl. 12), http://www.civilrightsproject.harvard.edu/research/deseg/Resegregation_American_Schools99.pdf (citing figures derived from the National Center for Education Statistics, 1996-97 Common Core of Data). During the same time period, the average African-American student attended schools where 42.7% of the students were poor (received free or reduced-price lunch), whereas the average white student attended school where 18.7% of the students were poor. Gary Orfield and Chungmei Lee, *Why*

- Segregation Matters: Poverty and Educational Inequality (Cambridge, MA: Civil Rights Project, 2005), 6-7, http://www.civilrightsproject.harvard.edu/research/deseg/Why_Segreg_Matters.pdf. See also Linda Darling-Hammond and J. Green, "Teacher Quality and Equality," in *Access to Knowledge: The Continuing Agenda for Our Nation's Schools*, eds. John Goodlad and Pamela Keating (New York: College Board, 1994); Bowen et al., *Equity*, 78 ("In 2000, about 36 percent of schools where more than 75 percent of students receive free or reduced price lunches had one or more teachers leave in the middle of the school year" and "in 1994, salaries were 28 percent lower for teachers in schools with high poverty levels than for teachers in schools with low poverty levels").
22. Orfield and Lee, *Segregation Matters*, 11.
23. Daniel J. Losen and Gary Orfield, "Introduction," in *Racial Inequity in Special Education*, eds. Daniel J. Losen and Gary Orfield (Cambridge, MA: Civil Rights Project, Harvard Education Press, 2002), xvi-xvii.
24. Advancement Project, *Education on Lockdown, The Schoolhouse to Jailhouse Track* (2005), 8, <http://www.advancementproject.org/reports/FINALE-OLrep.pdf>.
25. Sandra Ruppert, *Closing the College Participation Gap: A National Summary* (Center for Community College Policy, October 2003). The access gap is exacerbated by minority students' limited access to technology because colleges are increasingly relying upon the Internet and other technological innovations in admissions and recruitment. Joel H. Vargas, *College Knowledge: Addressing Information Barriers to College* (Educational Resources Institute, 2004), www.teri.org/PDF/CollegeKnowledge.pdf.
26. William Trent, "The 'Pipeline' Problem: Using Research to Inform Policy and Practice," Remarks at National Conference on Race and Ethnicity in Higher Education, New York, NY, June 3, 2005.
27. Don Hossler et al., *Going to College: How Social, Economic and Educational Factors Influence the Decisions Students Make* (Baltimore: Johns Hopkins University Press, 1999); Arthur Levine and Jana Nidiffer, *Beating the Odds: How the Poor Get Into College* (San Francisco: Jossey-Bass, 1996), 141.
28. David Hawkins, *The State of College Admissions* (Alexandria, VA: National Association of College Admission Counseling, 2003); Patricia McDonough, "Counseling Matters: Knowledge, Assistance and Organizational Commitment in College Preparation," in *Preparing for College: Nine Elements of Effective Outreach*, ed. William G. Tierney et al. (New York: SUNY Press, 2004).
29. "The Schooling of Black Americans," in *A Common Destiny: Blacks and American Society*, eds. Gerald D. Jaynes and Robin M. Williams, Jr. (Washington, D.C.: National Academy Press, 1989), 378-79. From 1991 to 2001, black enrollment in higher education increased 36.9% to nearly 1.8 million students. American Council on Education, *Minorities in Higher Education 2003-2004: Twenty-First Annual Status Report* (Washington, D.C., 2005), <http://www.acenet.edu/bookstore/new.cfm> [hereinafter ACE Report].
30. National Center for Education Statistics, *Digest of Education Statistics* (Washington, D.C., 2003), tbl. 185, <http://nces.ed.gov/programs/digest/d03/tables/dt185.asp>. This statistic measures post-secondary enrollment of students ages 16-24 who either graduated from high school or completed their GED in the twelve months preceding October 2001.
31. ACE Report, 17. See also Watson Scott Swail et al., *Retaining Minority Students in Higher Education: A Framework for Success*, ASHE-ERIC Higher Education Report, vol. 30, no. 2 (San Francisco: Wiley Subscription Services, 2003), vii (of students enrolling in four-year institutions in 1995-96, 72% of Asian Americans and 67% of whites had completed degrees within six years, compared to only 46% of African Americans and 47% of Latinos).
32. ACE Report, 17.
33. Patricia M. McDonough, *Choosing Colleges: How Social Class and Schools Structure Opportunity* (Albany, NY: SUNY Press, 1997), 2. See also Patricia McDonough et al., "Black Students, Black Colleges: An African-American College Choice Model," *Journal for a Just and Caring Education* 3(1) (1997): 9-37; Sylvia Hurtado et al., "Differences in College Access in Choice among Racial/Ethnic Groups: Identifying Continuing Barriers," *Research in Higher Education* 38(1) (1996): 43-75; Kassie Freeman, "Increasing African Americans' Participation in Higher Education: African American High-School Students' Perspectives," *Journal of Higher Education* 68 (1997): 523-551; Levine and Nidiffer, *Beating the Odds*.
34. Swail et al., *Retaining Minority Students*, 58; Susan R. Rankin and Robert D. Reason, "Differing Perceptions: How Students of Color and White Students Perceive Campus Climate for Underrepresented Groups," *Journal of College Student Development* 46 (2005): 43; Claude Steele and Joshua Aronson, "Stereotype Threat and the Test Performance of Academically Successful African Americans," in *The Black-White Test Score Gap*, eds. Christopher Jencks and Meredith Phillips (Washington D.C.: Brookings Institution Press: 1998).
35. Swail et al., *Retaining Minority Students*, 100-103 (describing the importance of academic services, including "academic advising, supplementary instruction, tutoring and mentoring, research opportunities, precollege programming, and bridging programs."); P. Michael Timpane and Arthur M. Hauptman, "Improving the Academic Preparation and Performance of Low-Income Students in American Higher Education," in *America's Untapped Resource*, ed. Richard Kahlenberg (New York: Century Foundation, 2004), 98-100; Lyle Gohn et al., "A Case Study of Second Year Student Persistence," *Journal of College Student Retention* 2(4) (2000-2001): 292.
36. Robert Atwell, "The Long Road Ahead: Barriers to Minority Participation Persist," *Reflections on 20 Years of Minorities in Higher Education and the ACE Annual Status Report* (Washington, D.C.: American Council on Education, 2004), 1. Vincent Tinto, *Student Retention and Graduation: Facing the Truth, Living With The Consequences* (Pell Institute, 2004), 11-14.
37. Advisory Committee on Student Financial Assistance, *Access Denied: Restoring Equal Educational Opportunity* (Washington, D.C., 2001), http://www.ed.gov/about/bdscomm/list/acfsa/access_denied.pdf; Advisory Committee on Student Financial Assistance, *Empty Promises: The Myth of College Access in America* (Washington, D.C., 2002), <http://www.ed.gov/about/bdscomm/list/acfsa/emptypromises.pdf>; Edward P. St. John, *The Access Challenge: Rethinking the Causes of the Opportunity Gap*, Policy Issue Report No. 2002-1 (Bloomington, IN: Indiana Education Policy Center, 2002).
38. Anthony P. Carnevale and Stephen J. Rose, *Socioeconomic Status, Race/ethnicity and Selective College Admissions* (The Century Foundation, 2003), http://www.tcf.org/Publications/Education/carnevale_rose.pdf.
39. Peter Schmidt, "'Report Card' Spurs Calls for Change in Academe," *Chronicle of Higher Education*, September 24, 2004. Even after taking grants, subsidized loans, work, and a reasonable family contribution into account, low-income students face an average unmet need of \$3,700. National Dialogue on Student Financial Aid, *Challenging Times, Clear Choices: An Action Agenda for College Access and Success* (New York: College Board, January 2003), http://www.collegeboard.com/prod_downloads/about/news_info/natdial/intro_challenging.pdf. Indeed, only 58% of low-income students earned their bachelor's degree within six years of entering a post-secondary institution compared to 81% of high-income students. Alberto F. Cabrera et al., *On the Right Path: the Higher Education Story of One Generation* (College Station, PA: Center for the Study of Higher Education, Pennsylvania State University, 2001), <http://www.sheeo.org/diversity/On%20the%20Right%20Path.pdf>.
40. Berkner and Chavez, *Access to Postsecondary Education*, 6 (fig. 1). Low-income is defined as family income of less than \$25,000.
41. "The Persisting Racial Gap in College Student Graduation Rates," *Journal of Blacks in Higher Education* 45 (Autumn 2004): 77-85.
42. Bowen et al., *Equity*, 91.
43. Rebecca M. Blank, "An Overview of Trends in Social and Economic Well-Being by Race," in *America Becoming*, eds. Smelser et al., 21-39.
44. Kathryn Hoffman et al., *Status and Trends in the Education of Blacks*, National Center for Education Statistics (Washington, D.C., 2003), 107, <http://nces.ed.gov/pubs2003/2003034.pdf>.
45. For instance, of the 16,648 students who matriculated at medical schools in 2004, 7.4% were African American and 68.7% were white. American Association of Medical Colleges, "Facts: Applicants by Race and Ethnicity within Sex, 2002-2004" (Washington, D.C., 2004), www.aamc.org/data/facts/2004/20020304det.htm; American Medical Association, "Racial & Ethnic

Backgrounds of Medical Students - 1st Year Enrollment: 2004" (Chicago, 2004), www.ama-assn.org/ama/pub/category/12934.html. In 2003, fewer than one in fourteen of the total Ph.D.s awarded at U.S. universities went to African-American or Hispanic U.S. citizens. Among all U.S. citizens who received doctorates in 2003 in the arts and sciences, where the Ph.D. is the entry-level degree for scholars and researchers, only 4.3% were African American. Woodrow Wilson National Fellowship Foundation, Diversity and the Ph.D. (Princeton, NJ, May 2005), http://www.woodrow.org/newsroom/News_Releases/WW_Diversity_PhD_web.pdf.

Opportunity gaps are also particularly significant in access to law schools, which, as the Supreme Court noted in *Grutter*, "represent the training ground for a large number of our Nation's leaders." 539 U.S. at 332. Of the 45,070 students who enrolled in law school in 2000-2001, only 7.2% were African American whereas 78.8% were white. American Bar Association, "Legal Education Statistics" (Chicago, n.d.), <http://www.abanet.org/legaled/statistics/stats.html>. Enrollment statistics for 2001 are based on data from programs at 187 ABA-approved law schools. See also Linda F. Wightman, "The Consequences of Race-Blindness: Revisiting Prediction Models With Current Law School Data," *Journal of Legal Education* 53 (2003): 231. Moreover, African-American law students are more than twice as likely as white students to drop out during their first year of law school (12.4% versus 5.5%), and only 57% of African Americans who enroll in law school ultimately graduate and pass the bar, as compared to 83% of white students. Timothy Clydesdale, "A Forked River Runs Through Law School: Towards Understanding Race, Gender, Age and Related Gaps in Law School Performance and Bar Passage," *Law and Society Inquiry* 29 (2004): 711, 727.

46. Vernez et. al., Closing the Education Gap, 59.

47. *Id.*, 60-78.

48. *Id.*, 79.

49. "Bush Spells It Out to Journalists; He Discusses a Variety of Issues at UNITY Meeting," *San Antonio Express-News*, August 7, 2004.

50. Bill Gates, Remarks to the National Governors Association Achieve Summit, February 26, 2005, <http://www.nga.org/cda/files/es05gates.pdf>.

51. Sam Dillon, "School Law Spurs Efforts to End Minority Gap," *New York Times*, May 27, 2005; Nancy Kober, It Takes More Than Testing: Closing the Achievement Gap (Washington, D.C.: Center on Education Policy, August 2001), <http://www.ctredpol.org/studentachievement/closingachievementgap.pdf>; Vernez et al., Closing the Education Gap; "The Persisting Racial Gap in College Student Graduation Rates," *Journal of Blacks in Higher Education* 45 (Autumn 2004): 77-85; Abigail Thernstrom and Stephan Thernstrom, *No Excuses: Closing the Racial Gap in Learning* (New York: Simon and Schuster, 2003); Richard Rothstein, *Class and Schools* (New York: Economic Policy Institute, 2004).

"[The] wide and sometimes growing achievement gap confirms that there is a two-tiered educational system" that is "not unlike that of a de facto system of apartheid." Former Secretary of Education Rod Paige, Back-to-School Address, National Press Club, Sept. 24, 2003, <http://www.ed.gov/news/speeches/2004/09/09242004.html>.

"We have a growing problem in America . . . We have a growing achievement gap that exists between middle- and upper-income schools and our minority schools. We as a society cannot turn a blind eye to this problem." Rep. John A. Boehner, Chairman of the Education and Workforce Committee (quoted in Lizette Alvarez, "House Votes for New Testing to Hold Schools Accountable," *New York Times*, May 24, 2001).

52. "In Poll, Schools Earn Good Grades: Majority Get As, Bs, Only 5% Get Fs," *Washington Times*, Aug. 23, 2001.

53. Bill Frist, "Education: The Birthright of Every American Child," *Weekly Column*, September 2004, http://frist.senate.gov/index.cfm?FuseAction=Columns.Detail&Column_id=42.

54. "Transcript of Debate Between Bush and Kerry, With Domestic Policy the Topic," *New York Times*, October 14, 2004.

55. No Child Left Behind Act, Pub. Law. 107-110 Sect. 1111 (3)(C)(xiii) (requiring that results be "disaggregated within each State, local educational agency,

and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged").

56. *Grutter*, 539 U.S. at 330-31.

57. *Id.* at 331.

58. *Id.* at 332-33 (access to education "must be inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America").

59. Brief of 65 Leading Business as Amici Curiae at 5-6, *Grutter v. Bollinger*, 536 U.S. 306 (2003), <http://www.umich.edu/~urel/admissions/legal/grutter/>; see also Brief of General Motors Corporation as Amici Curiae, *Grutter v. Bollinger*, 536 U.S. 306 (2003).

60. Consolidated Brief of Amici Curiae Lt. Gen. Julius W. Becton Jr. et al. at 9-10, *Grutter v. Bollinger*, 536 U.S. 306 (2003), http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/um/MilitaryL-both.pdf.

61. *Grutter*, 539 U.S. at 332 (emphasis added).

62. *Id.* (emphasis added).

63. *Id.* at 340-41.

64. 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

65. *Grutter*, 539 U.S. at 343.

66. George C. Wallace, 1963 Inaugural Address, January 14, 1963, Montgomery, Alabama, http://www.archives.state.al.us/govs_list/inauguralspeech.html.

67. Jack Greenberg, *Crusaders in the Courts* (New York: Basic Books, 1994), 338-340.

68. Anti-affirmative action groups are also attempting to make an end-run around the Michigan decisions through efforts at the state level to secure legislation or ballot initiatives prohibiting the use of affirmative action. In addition to successful pre-*Grutter* campaigns in California and Washington State, current campaigns are underway in Michigan and elsewhere. Americans for a Fair Chance, *Anti-Affirmative Action Threats in the States: 1995-2004*, (Washington D.C., 2005), http://fairchance.civilrights.org/the_facts/reports/aa_state_2005.pdf.

69. Lee Kokorinos, *The Assault on Diversity: An Organized Challenge to Racial and Gender Justice*, Institute for Democracy Studies (Lanham, MD: Rowman and Littlefield, 2003).

70. Peter Schmidt, "Advocacy Groups Pressure Colleges to Disclose Affirmative-Action Policies," *Chronicle of Higher Education*, April 2, 2004.

71. Peter Schmidt, "Not Just for Minority Students Anymore," *Chronicle of Higher Education*, March 19, 2004.

72. Roger Clegg, "Grutter @ 1," *National Review Online*, June 23, 2004, <http://www.nationalreview.com/clegg/clegg200406231013.asp> ("The National Association of Scholars has systematically enlisted its state affiliates to send freedom of information requests to state schools, asking for documents bearing on whether those schools use preferences and, if so, how exactly they work. . . . Many schools are indicating that they don't use preferences; others still do, but the effect of the information requests is to make these schools more vulnerable to public, legislative and courtroom pressure").

73. David J. Armor, "Affirmative Action at Three Universities," paper presented at the Virginia Association of Scholars Annual Meeting, November 13, 2004, http://www.nas.org/reports/foi/AA_at_3Us.pdf. See also Schmidt, "Advocacy Groups Pressure Colleges."

74. 34 C.F.R. 100.7 (1980).

75. Jeffrey Selingo, "Michigan: Who Really Won?" *Chronicle of Higher Educa-*

tion, January 14, 2005 (noting that the enrollment of African-American and Latino students in the 2004 freshman class – the first to be admitted after the Michigan decisions – dropped at many large universities including Michigan, Ohio State, and Georgia). Black enrollment figures are expected to improve somewhat for the Fall 2005 freshmen classes at the University of Georgia, due in large part to intensive race-conscious recruitment efforts. However, a significant gap persists between the percentage of blacks enrolled and the percentage of blacks of college age in the state’s population. Ashley Fielding, “University Focuses on Increasing Diversity,” *Red & Black* (University of Georgia), June 16, 2005. Michigan also expects an increase in minority enrollment for fall 2005, due to such intensive race-conscious recruitment efforts as radio announcements in areas with large minority populations, speaking engagements for the university president at black and Latino churches, and sending videos to every minority student after they had been accepted. See Jeremy Davidson, “Minority Recruitment Up for Next Fall,” *Michigan Daily*, June 13, 2005.

76. Selingo, “Michigan: Who Really Won?”

77. Peter Schmidt, “Federal Civil-Rights Office Investigates Admission Policies at U. of Virginia,” *Chronicle of Higher Education*, December 8, 2004; Alyson Klein, “Foes of Affirmative Action Take Aim at Scholarship Offered by Pepperdine U.,” *Chronicle of Higher Education*, January 23, 2004.

78. U.S. Department of Education, *Achieving Diversity: Race-Neutral Alternatives in American Education*, Office for Civil Rights (Washington, D.C., 2004), <http://www.ed.gov/about/offices/list/ocr/edlite-raceneutralreport2.html>.

79. See *Grutter*, 539 U.S. at 340.

80. *Grutter*, 539 U.S. at 329 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer.”).

81. These Justices include the five in the *Grutter* majority and Justice Kennedy who acknowledges in his dissent that the consideration of race in higher education admissions can satisfy a compelling state interest. See *Grutter*, 539 U.S. at 388-89 (Kennedy, J., dissenting) (“Our precedents provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task.”).

82. *Gratz v. Bollinger*, 539 U.S. 244, 275 (2003)

83. U.S. Department of Education, “Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Act of 1964,” 59 Fed. Reg. 8756 (February 23, 1994) [hereinafter 1994 Policy Guidance].

84. The “Department [of Education] agrees that there are important differences between admissions and financial aid.” 1994 Policy Guidance.

85. A college may use “race or national origin as a condition of eligibility in awarding financial aid if this use is narrowly tailored, or, in other words, if it is necessary to further its interest in diversity and does not unduly restrict access to financial aid for students who do not meet the race-based eligibility criteria.” 1994 Policy Guidance.

86. See *Comfort v. Lynn School Committee*, No. 03-2415 (1st Cir. June 16, 2005) (en banc).

87. *Regents of University of California v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring).

88. Rod Paige, Remarks at the Negro Council of Women 50th National Convention, December 7, 2001, <http://www.ed.gov/news/speeches/latest/index.html?src=gu>.

89. Margaret Spellings, “Closing the Achievement Gap and Keeping the Economy Strong,” Remarks at the U.S. Hispanic Chamber of Commerce Legislative Conference, April 19, 2005, <http://www.ed.gov/news/speeches/latest/index.html?src=gu>.

90. U.S. Department of Education, *Achieving Diversity*, 48.

91. U.S. Department of Education, President’s FY 2006 Budget Request for the U.S. Department of Education, <http://www.ed.gov/about/overview/budget/budget06/index.html>.

92. Carnevale and Rose, *Socioeconomic Status*, 36.

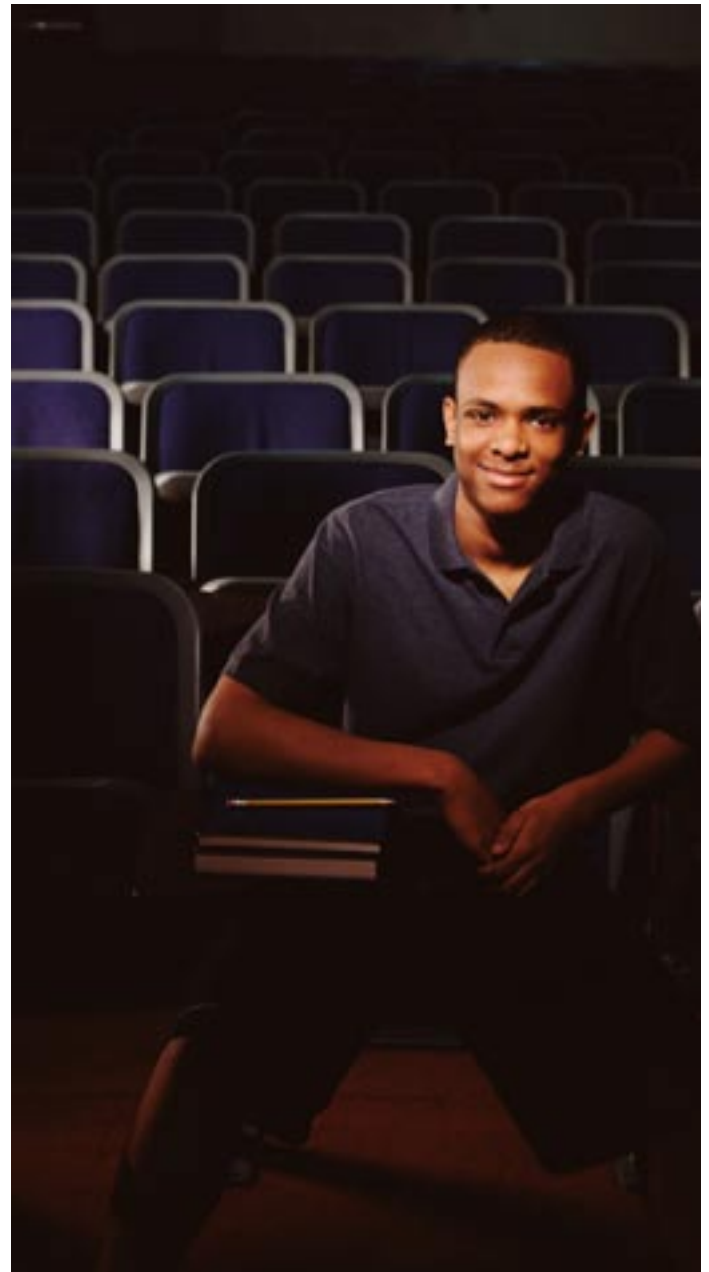
93. *Id.*, 59-61.

94. Thomas J. Espenshade and Chang Y. Chung, “The Opportunity Cost of Admission Preferences at Elite Universities,” *Social Science Quarterly* 86 (2005): 293, 303. Based on data for the 1997 entering class.

95. Bowen et al., *Equity*, 255.

96. *Bakke*, 438 U.S. at 400 (Marshall, J., dissenting in part).

97. Lyndon B. Johnson, Remarks at the Howard University Commencement, June 4, 1965, <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp>.





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