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RACIALLY BIAS SAT I/ACT BLOCKS COLLEGE ACCESS: IS IT CONSTITUTIONAL FOR COLLEGE OFFICIALS TO CONDITION ADMISSION ON A RACIALLY BIAS ASSESSMENT?

By: Kendra Johnson¹

I. INTRODUCTION

University of California President Richard Atkinson advances verbal analogy questions: DRAPERY is to FABRIC as (pick one) fireplace is to wood; curtain is to stage; shutter is to light; sieve is to liquid; window is to glass. These questions comes from the SAT I exam that 1.3 million college applicants take every year.² SAT I questions are not that tough, but Atkinson believes they show the test is a capricious exercise that adds little information to what other tests and grades show about a student's academic capabilities.³

Pursuant to the Equal Protection Clause of the Fourteenth Amendment,⁴ legal challenges to the use of standardized assessment tests for decision-making in schools have focused on ability tracking,⁵ test disclosure,⁶ teacher competency,⁷ placement in special education classes,⁸ and assessment test scores as school admissions criteria. These legal challenges have been definitively addressed in all of the above-mentioned areas except for the use of standardized assessment test scores as school admissions criteria.

A wasteland of commentaries exists relating to the elitist fathers of standardized assessment tests, the rationale behind such assessment tests, and the discriminatory effect of using standardized tests as a condition for college admission.⁹ The constitutionality of the racially biased SAT I/ACT as a condition for college admission has not been legally challenged; therefore, the legal viability of these commentaries is uncertain.

This article argues that college officials are in violation of Title VI of the Civil Rights Act of 1964.¹⁰ The SAT I/ACT has a significant adverse impact on African American college applicants. Moreover, college officials knowingly and willingly use the SAT I/ACT when there are viable alternatives to determine admission to colleges and universities coupled with the precept of inferiority¹¹ in our

society, particularity within the educational system, establish the intent to discriminate against African American college applicants. This comment presents the issue of using standardized assessment tests as a condition for college admission. Part II discusses the history of the SAT I/ACT, types of bias in standard testing, racial bias inherent to the SAT I/ACT, and the use of standardized assessments¹² as college admission criteria. Part III provides an overview of the possible legal challenges to the use of racially biased assessment tests as a condition for college admission, and part IV analyzes the present standing of a legal challenge regarding the use of standardized assessment tests as a condition for college admission. Part IV concludes that college officials are in violation of Title VI of the Civil Rights Act of 1964 because the SAT I/ACT has a significant adverse impact on African American college applicants. College officials use the SAT I/ACT even though there are viable alternatives for determining college and university admission.

II. BACKGROUND

A. History of SAT I/ACT

At its inception, SAT was an acronym for the Scholastic Aptitude Test and then the Scholastic Assessment Test. The test is now officially named the SAT I because of uneasiness at the Educational Testing Service ("ETS") and the College Board about defining just what the test measures.¹³ The SAT is the nation's oldest, most widely used and misused college entrance assessment test. The SAT is composed of two sections: verbal and math. Each section is scored on a 200-800 point scale. Approximately 138 questions are exclusively multiple choice. Ten math questions require students to "grid in."¹⁴ By design, the SAT is "speeded" which means that many assessment takers will be unable to complete the assessment test.

Carl Brigham, a professor of psychology at Princeton

University,¹⁵ created the SAT. Brigham also developed IQ tests for army recruits before World War I, which he began to use for college use; he administrated the SAT for the first time in 1926.¹⁶ At the beginning of World War II, previous college admission tests were replaced by the SAT, which all college applicants were required to take.¹⁷

The ETS¹⁸ was founded in 1947 when the American Council on Education, the Carnegie Foundation for the Advancement of Teaching, and the College Entrance Examination Board turned over their testing programs, a portion of their assets, and a percentage of their employees.¹⁹ The ETS is the single largest national organization devoted exclusively to educational testing and research.²⁰ The ETS, under contract with the College Board, produces and administers all SAT assessment tests.

In response to the revised SAT²¹ administered by the ETS, the ACT, formerly American College Testing Program Assessment, was created in 1959. The ACT, created by E.F. Lindquist²² and Ted McCarrel, was initially designed to more closely relate to high school curriculums than the SAT.²³ The ACT was supposed to combine achievement and aptitude, while the SAT was solely aptitude. However, ACT and SAT scores correlate very highly.²⁴ In fact, most universities now treat the ACT and SAT interchangeably and allow college applicants the option of submitting either assessment score.²⁵ The ACT is required predominantly in the Midwest, Southwest, and Deep South, while the SAT I²⁶ is required mainly on the East and West Coasts.²⁷

B. Types of Bias in Standardized Testing

Are all cognitive tests racially or culturally biased? A considerable number of Americans answer this question in the affirmative.²⁸ When analyzing racial bias in testing, scholars characterize bias in testing as labeling bias, content bias, or methodological bias.²⁹

Labeling bias occurs when a test claims to measure one thing, but actually measures something else.³⁰ Labeling bias appears most often in tests that measure either "intelligence" or "aptitude."³¹ Most citizens, including federal judges hearing challenges to college admissions assessment tests, perceive both intelligence and aptitude as innate traits.³² Almost all psychologists conclude that an individual's score on an intelligence or aptitude test depends partly on genetic makeup, but also reflects a myriad of environmental factors. In addition, many psy-

chologists, as well as lay persons, agree that environmental influences play some role in the black-white test score gap.³³

Content bias is similar to labeling bias. Content bias occurs when a test claims to measure something that could in principle be measured in an unbiased way, but fails to do so because it contains questions that favor one group over another.³⁴ For example, suppose French and English speaking Canadians take a vocabulary test. If the test is in English, it will underestimate the vocabulary of French-speaking children. The tester can eliminate this disparity by re-labeling the test to measure English vocabulary or by including equal numbers of French and English words.³⁵

Methodological bias occurs when a test assesses mastery of some skill or body of information using a technique or method that underestimates the competence of one group relative to another.³⁶ Using multiple-choice questions, instead of essays or tests where students are under severe time pressure, illustrates methodological bias.³⁷ Although it is not clear how much methodological bias distorts black-white comparisons, no one has produced a testing methodology that sharply reduces the black-white gap.³⁸

Prediction bias occurs whenever a test is used to predict an individual's future performance.³⁹ For example, colleges use SAT I to predict applicants' college grades. If African American undergraduates typically earned higher grades than whites with the same SAT I scores, many individuals would probably conclude that the SAT I was biased against African Americans.⁴⁰ However, whites with the same SAT I scores as African Americans tend to have higher grades than their African American counter-parts.⁴¹

1. Racial Bias on the SAT I/ACT

In 1988, approximately 7,000 African American high school seniors scored 1000 or above on the combined SAT I.⁴² Therefore, African Americans rank in the 80th percentile on these tests. The national average score was about 900.⁴³ An estimated 21,000 African American high school seniors scored 700 or below on the SAT (approximately the 15th percentile).⁴⁴

In addition, Georgia eliminated the SAT I as a requirement for students pursuing career programs in its community college system because it was of little value

and intimidated many students.⁴⁵ As a result of Georgia's initiatives, other community colleges eliminated the SAT I as an admission requirement.⁴⁶

A study⁴⁷ regarding the SAT I by James Crouse and Dale Tresheim analyzes the SAT I scores' poor utility in forecasting both short-and long-term success. The study compared two admissions strategies, one using just the high school record of the student and the other using the high school record and SAT I score.⁴⁸ More than 90 percent of the admissions decisions were the same under both strategies. However, the SAT I-based strategy led to far greater rejections of otherwise academically qualified minority and low-income applicants.⁴⁹ Also, data demonstrated that using the high school record alone to predict who would complete a bachelor's degree resulted in "correct"⁵⁰ admissions decisions 73.4 percent of the time, while using the SAT I and high school grade point average forecast resulted in "correct" admissions decisions in 72.2 percent of the cases.⁵¹

The four-year study⁵² of some 878,000 students enrolled in the University of California system looked at the relationship between high school GPA, SAT I score, SAT II⁵³ score, and first-year undergraduate grades. The weakest predictor of college performance proved to be SAT I scores, which explained just 12 percent of the difference (or variation) in freshman grades.⁵⁴ SAT II scores and GPA each separately explained approximately 15 percent of the variance; each of these factors did a better job of forecasting college performance than the SAT I. Adding the SAT I to this equation improved the predictive ability by less than one percent, which demonstrated that the SAT I adds little information to the assessment of a student's application.⁵⁵ In addition, researchers discovered that the predictive power of the SAT I was further compromised when socioeconomic status was taken into account. The research concluded that SAT I scores are more closely associated with family income and parents' education than SAT II scores or high school GPA.⁵⁶

One study at Chicago State University confirmed that the ACT score does a poor job of predicting academic performance in college.⁵⁷ For the vast majority of the university's graduates who scored in the middle range of the test as high school students, the ACT explained only 3.6 percent of the differences in cumulative college grade point average.⁵⁸ In fact, the exam over-predicted the per-

formance of the class graduating in 1992, which had the highest average ACT score among the classes in the research study, yet the poorest academic performance over four years at the university.⁵⁹

Moreover, a report from Bates College, which made SAT I score submittal optional in 1985, concludes that "the optional SAT I policy has had no negative, and quite possibly a positive, impact on the quality of students admitted."⁶⁰ Student quality increased since Bates adopted the policy; academic performance of SAT submitters and nonsubmitters is nearly the same; nonsubmitters' GPAs are higher than their SAT's would predict; "none of the standardized tests (currently in use at Bates) predict students' performance very well."⁶¹ The authors conclude, "there is much in the data that would call into question the policy of requiring any standardized test scores, given how poorly they predict academic performance at Bates."⁶²

However, some scholars hesitate to argue that the SAT I underestimates the academic potential of African American applicants. These scholars are skeptical of the following argument:

1. Other things being equal, innate ability probably has some effect on both SAT I scores and college grades;
2. African Americans have the same innate ability as whites;
3. But, African Americans score lower on the SAT I than whites.⁶³

Therefore, the average African American with a total SAT I score of 1000 began life with more innate ability than the average white with the same score.⁶⁴ In addition, African Americans should earn higher college grades than whites with the same SAT I scores because African Americans have a greater innate ability than whites with same SAT I score.⁶⁵

Critics assert that this argument is flawed. Statistics indicated that African Americans earn lower grades than whites with the same SAT I scores.⁶⁶ Also, this is correct for cumulative grade point averages over all four years of college. Moreover, racial disparity in grades is wider among students with the highest SAT I scores attending selective colleges and universities.⁶⁷

In addition, supporters of the SAT I concede that it is a flawed assessment test;⁶⁸ however, they question whether there is a viable alternative. Supporters of the SAT I believe it is the best assessment as this time. They

point out that “scores on the SAT I are positively correlated with performance in college and that higher SAT I scores are indicative of higher scores in college.”⁶⁹ Moreover, “the SAT I is a standardized assessment administered to thousands” of students annually at a minimum cost to universities and colleges, which get much of the benefit from the test.⁷⁰ The SAT I allows larger state universities to rank applicants by mathematical formula, and at smaller universities, it allows for admissions personnel to glance inside the mind of the applicant. Also, supporters of the SAT I further suggested “the test is objective because it is the same for every student from every public and private school system in the country.”⁷¹ Furthermore, SAT I supporters argue that a variety of factors explains why Caucasian males continue to perform better on the SAT I than other groups. For example, better schools and higher parental income have an impact on test scores and women still do not take as many advanced math and science courses as men.⁷²

A. College Admission Procedures⁷³

All colleges and universities, with the exception of approximately 400 (see Appendix C), require the SAT I or ACT.⁷⁴ Although colleges and universities do not definitively state that applicants must meet a minimum SAT I or ACT score, college officials advance minimum SAT I and ACT scores by including the range of SAT scores in the freshman class profile.⁷⁵ The significance of including SAT I/ACT scores in college brochures and college handbooks is paramount. Students are likely to be discouraged from applying to schools where their SAT I/ACT scores fall below the SAT I/ACT range cited in college literature. This collective thought is based on colleges and universities conscious and direct advancement of their school’s freshman profile, which clearly advertises the range of SAT I/ACT scores earned by incoming freshman. College officials do not, however, indicate the socioeconomic range, high school GPA, and geographical diversity of incoming freshman, and many officials do not advance the racial diversity of the freshman class. Students seeking admission into the school’s freshman class can characterize the conscious efforts of college officials as an intentional attempt to advance minimum SAT I/ACT scores needed for admission.

III. ANALYSIS

A. Equal Protection Clause

Section I of the Fourteenth Amendment of the United States Constitution provides that “[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside,” and it further provides that “[n]o State shall . . . deny to any person within its jurisdiction the equal protections of the laws.”⁷⁶ The command of the Equal Protection Clause that no State shall deny to any person within its jurisdiction equal protection of the law is essentially a direction that all persons situated alike should be treated alike.⁷⁷ The Equal Protection Clause is violated only by purposeful⁷⁸ and intentional discrimination.⁷⁹ Mere governmental negligence is insufficient to sustain an equal protection claim,⁸⁰ since such a claim also requires the presence of an unlawful intent to discriminate against a plaintiff for an invalid reason. The plaintiff need not prove that another fundamental right was trampled, as the right to equal protection of the law is itself fundamental. The plaintiff does not have to prove that he or she was victimized by a “suspect classification” such as race, but the discrimination must be intentional, and the government’s motive must fail to comport with the requirements of equal protections.⁸¹

Since our country’s inception, courts have addressed allegations of discrimination. Moreover, courts determined many forms of discrimination within an educational setting were in contravention of the United States Constitution. In *Larry P. v. Riles*,⁸² the United States District Court for the Northern District of California upheld the lower court’s holding that IQ tests used by the California school system violated federal statutes.⁸³ The court determined the school system could not demonstrate that IQ tests, which resulted in disproportionate placement of African American children, were required by educational necessity.⁸⁴ However, the appellate court reversed the lower court’s finding that the school system was guilty of intentional discrimination under the Fourteenth Amendment of the Constitution because the pervasiveness of the discriminatory effect could not be equated with the necessary discriminatory intent.⁸⁵ The court’s conclusion was consistent with the Supreme Court’s interpretation of the appropriate standard of review for equal protection vio-

lation claims.⁸⁶

In *Washington v. Davis*,⁸⁷ the United States Supreme Court made it much more difficult to eliminate racial inequities by stating the standard for review of an equal protection violation claim is purposeful or intentional discrimination, thus excluding the various forms of "racial discrimination that is done accidentally or unconsciously but is, nevertheless harmful."⁸⁸

In order to advance the argument that college officials are within the scope of the Fourteenth Amendment, we must first determine whether there has been "state action." Although education is not specifically mentioned in the federal Constitution, the federal government has a historic involvement in education. In fact, educational programs under various federal laws pertaining to education in recent years have made up approximately six percent of the total amount of money expended for public elementary and secondary education.⁸⁹ Perhaps of greater importance has been the pervasive and significant force of the federal judiciary in influencing educational policy. Controversial educational issues such as racial segregation in schools, financing of schools, due process for both students and teachers, the role of religion in the schools, the extent to which students and teachers may engage in freedom of expression, and standardized testing have all been addressed by the federal judiciary.⁹⁰

The United States Supreme Court in *The Civil Rights Cases*⁹¹ first discussed the concept of state action. In *The Civil Rights Cases*, the Court determined that only state action is within the scope of the Fourteenth Amendment.⁹² Courts have determined state colleges and universities and college and universities receiving federal funding are actors of the state,⁹³ thus falling within the scope of the Fourteenth Amendment.⁹⁴ Generally, colleges and universities that receive any federal funding are likely within the reach of the United States Constitution.⁹⁵

The equal protection guarantee is intended to secure equality of protection not only for all but against all similarly situated. African American students have a viable claim against college officials for conditioning admission upon a racially biased SAT I/ACT. One purpose of the Equal Protection Clause is to ensure that citizens are not subject to arbitrary and discriminatory state action.⁹⁶ Therefore, African American students can claim a violation of the Equal Protection Clause of the Fourteenth

Amendment by arguing they are subject to discriminatory state action when college officials condition admission upon the racially biased SAT I/ACT.⁹⁷ Beginning with the Warren Court, the United States Supreme Court intensified equal protection scrutiny of legislation.⁹⁸ The Warren Court created suspect classes and mandated a special level of scrutiny.⁹⁹ A classification based on race is inherently suspect.¹⁰⁰

Studies indicate the SAT I/ACT is racially and culturally biased,¹⁰¹ therefore college officials must advance a compelling state interest that is narrowly tailored to satisfy a governmental interest.¹⁰² The state interest advanced here is the need to "predict" college applicants' success in college, thus maximizing our country's economy by producing educated, productive citizens and consumers.¹⁰³ Contrary to the state's interest, studies reveal the SAT I/ACT scores are least effective when predicting a college applicant's likelihood of success in college.¹⁰⁴ Normally, if the state is unable to meet the compelling interest standard, the plaintiff would prevail. However, recent case law reveals the state action must also be intentional or purposeful discrimination.¹⁰⁵

At bar, it is unlikely that African American students would prove intentional or purposeful discrimination. Although African American students can articulate reasons why college officials would discriminate against African Americans, it is improbable that a court would determine there is a clear nexus between requiring racially biased SAT I/ACT scores as a condition for college admission and the purposeful intent by college officials to deny African American students college access.¹⁰⁶

B. Title VI of the Civil Rights Act of 1964

Title VI of the Civil Rights Act of 1964 provides that "no person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."¹⁰⁷ In addition, the act provides that a program or activity includes that operations of an instrumentality of a state or local government, an entity of a state that distributes federal financial assistance, and those entities that receive such funding: all levels of public education; and specified corporations, partnerships, or private organizations. If any part of an entity is listed in

the definition of “program or activity” and receives federal funds, Title VI covers the entire entity.¹⁰⁸ Moreover, any person aggrieved by a federal agency decision to terminate federal funding has standing to seek judicial review, including any state or political subdivision or a political subdivision of either,¹⁰⁹ as well as individuals and organizations.¹¹⁰

To state a claim under Title VI, a plaintiff must establish the defendant funding recipient’s purposeful discrimination,¹¹¹ and the receipt of federal funds.¹¹² To establish the elements of a prima facie discrimination case against a program or activity receiving federal financial assistance under Title VI, the complaining party must demonstrate that race, color, or national origin was the motive for the purposeful discrimination.¹¹³ When the decision maker is motivated by a factor other than the excluded party’s race, there is no intentional discrimination.¹¹⁴ In an action challenging a facially neutral practice, the plaintiff must show disparate-impact on a group protected by Title VI, which is a result of purposeful discrimination. Once a prima facie case is made, the defendant must provide a narrowly tailored, compelling interest that justifies the challenged practice. Merely providing circumstances that raise an inference of purposeful discrimination is insufficient.¹¹⁵ If no such purposeful discrimination is shown, no compensatory relief is awarded.¹¹⁶

African American plaintiffs can argue that college officials’ behavior is in contravention of Title VII of The Civil Rights Act of 1964. In order to adequately analyze likely results of this first impression issue, an evaluation of how courts have historically applied, as well as the current application, a disparate-impact Title VI argument to mandated educational assessments is appropriate. In *Gi Forum, Image De Tejas v. Texas Educational Agency*,¹¹⁷ a United States District court determined that the Texas Assessment of Academic Skills (TAAS) examination as a requirement for high school graduation did not have an impermissible disparate impact on Texas’ minority students in violation of Title VI.¹¹⁸ Although the disparate-impact argument did not prevail, the court clearly indicated that there are facts where assessments can have an impermissible disparate impact on minority students, which would be a violation of Title VI.¹¹⁹ Moreover, the United States Court of Appeals for the Fifth Circuit found a state could overstep its bounds in implementing stan-

dardized tests as graduation requirements.¹²⁰ Specifically, the court concluded a test did not measure what students actually learned could be fundamentally unfair.¹²¹ Also, the court stated a test that perpetuated the effects of prior discrimination was unconstitutional.¹²²

Furthermore, in *Cureton v. NCCA*,¹²³ the court determined that the NCCA was within the scope of Title VI.¹²⁴ Here, the NCAA member colleges divided into divisions.¹²⁵ The suit dealt with an NCCA bylaw called Proposition 16, which affected initial eligibility only in Division I.¹²⁶

Proposition 16, codified as NCAA bylaw 14.3 had two components that operated on a sliding scale: a minimum high school grade point average in thirteen required core courses and a minimum SAT I/ACT score.¹²⁷ Initially, the court determined that Proposition 16 had a disparate impact on African Americans.¹²⁸ However, the appellate court reversed and remanded the judgment entered against NCCA because it determined the NCCA was not a federally funded agency, thus a Title VI analysis was not appropriate. In dicta, however, the court asserts that only intentional or purposeful discrimination was within the reach of Title VI.¹²⁹ This recent court of appeals ruling suggests that the intentional and purposeful discrimination must be alleged and proved in a disparate impact Title VI claim.¹³⁰

1. *Alexander v. Sandoval*.¹³¹ A current Snapshot of the United States Supreme Court Disparate Impact Analysis

In *Alexander*,¹³² the Supreme Court carved out an important exception to the right of private action and determined intentional discrimination is the standard for a disparate impact analysis. Here, the Alabama Department of Public Safety, a recipient of federal financial assistance, was subject to Title VI of the Civil Rights Act of 1964. Sandoval brought this class action to enjoin the Alabama Department of Public Safety’s decision to administer the state driver license test only in English.¹³³ Sandoval argued the Alabama Department of Public Safety’s regulation subjected non-English speaking persons to discrimination based on their national origin.¹³⁴ Both the district court and the Eleventh Circuit agreed with Sandoval’s argument that the Alabama Department of Public Safety was in violation of Title VI of The Civil Rights

Act of 1964.¹³⁵ However, the United States Supreme Court reversed.

Unfortunately, the correct application of precedent was demonstrated in the district court and the eleventh circuit decisions. The United States Supreme Court's majority opinion¹³⁶ in *Alexander* is unfounded in precedent and is "hostile to decades of settled expectations."¹³⁷ Three aspects of the decision illustrate the flawed analysis of the United States Supreme Court. First, the Court determined that there is no private right to enforce disparate impact regulations promulgated under Title VI.¹³⁸ Second, the Court stated that section 601¹³⁹ prohibits only intentional discrimination.¹⁴⁰ Third, the Court determined that regulations promulgated under section 602¹⁴¹ may validly proscribe activities that have a disparate impact on racial groups, even though such activities are impermissible under section 601.

Although the United States Supreme Court is correct, this Court has never expressly recognized a private right of action to enforce the disparate impact regulations promulgated under section 602,¹⁴² the Court addressed this issue twenty-eight years ago, and was unanimous in determining that private parties could bring a lawsuit under Title VI and its implementing regulations to enjoin the provision of governmental services that discriminated against non-English speaking persons.¹⁴³ While five justices saw no need to go beyond the command of section 601, Chief Justice Burger, Justice Stewart, and Justice Blackman relied specifically on the regulations to support their conclusion that a private action existed.¹⁴⁴ Five years later in *Cannon v. University of Chicago*,¹⁴⁵ the Court more explicitly stated, "[w]e have no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination."¹⁴⁶ Although the majority acknowledges that *Cannon* is binding, the majority carved out an unprecedented exception, which is that a private right of action only exists in cases of intentional discrimination.¹⁴⁷ This exception is "wholly foreign to *Cannon*'s text and reasoning."¹⁴⁸

Then the Court stated that section 601 prohibits

only intentional discrimination.¹⁴⁹ Again, the majority relied on *Cannon*. *Cannon* is a disparate impact case where a female plaintiff brought a suit against two private universities challenging medical school admission policies that set age limits for applicants.¹⁵⁰ In *Cannon*, there is no language referring to intentional discrimination.¹⁵¹ The phrase the *Alexander* majority relied on, "because she is a woman," encompasses both intentional and disparate impact claims. Yet, the majority in *Alexander* reasoned that *Cannon* stood for the proposition that intentional discrimination is needed for a disparate-impact claim.¹⁵² This reasoning by the Court in *Alexander* is not supported by the decision in *Cannon*. For example, expressly applying the holding in *Cannon* to a disparate impact claim without intentional discrimination is permissible, which is described in detail in footnote one of the opinion.¹⁵³ Although it was not forthright, the holding in *Cannon* was reinforced in *Guardians Assn. v. Civil Serv. Comm'n of New York City*.¹⁵⁴ Furthermore, the *Alexander* majority relied on *Regents of the University of California v. Bakke*.¹⁵⁵ In *Bakke*, five members of the Court concluded that section 601 only prohibits race-based affirmative action programs in situations where the Equal Protection Clause would impose a similar ban.¹⁵⁶ However, the Court did not engage in an independent analysis of the reach of section 601. The only writing regarding Title VI came from two of the five justices in the majority, who wrote separately to reject the majority's blanket characterization that the standard of review for Title VI claims is intentional discrimination.¹⁵⁷

Third, the Court determined that regulations promulgated under section 602¹⁵⁸ may validly proscribe activities that have a disparate impact on racial groups, even though such activities are impermissible under section 601.¹⁵⁹ This conclusion is in contravention of the well-settled expectations derived from judicial decisions and legislative intent. Congress' actions over the last two decades reflect a clear understanding of the existence of a private right action to enforce Title VI and its implementing regulations.¹⁶⁰ Moreover, Congress has twice adopted legislation expanding the reach of Title VI of The Civil Rights Act of 1964.¹⁶¹

C. Precept of Inferiority¹⁶²

"At the time of the Declaration of Independence, and

when the Constitution of the United States was framed and adopted. . . . Blacks had no rights which the white man was bound to respect."¹⁶³ In *Dred Scott v. Sanford*,¹⁶⁴ a freed African American brought an action asserting his right to freedom under state and federal law. The Court determined that African Americans were not citizens and, therefore, were not afforded protection of the state and federal laws. Furthermore, when the Court first analyzed the Fourteenth Amendment to ascertain its scope, the Court determined that individuals and individual companies, without any discussion relating to the individuals' or companies' governmental affiliations, could discriminate against African Americans because their actions were not "action[s] of the state."¹⁶⁵ Although camouflaged as a non-race issue, the Court's decision was just another illustration of the presumption that African Americans were inherently inferior to all other ethnic groups, especially European Americans.

In *Crandall v. State*,¹⁶⁶ African Americans could not be educated in the States unless the school obtained a license, which could be denied if the city advanced a reasonable explanation for the denial.¹⁶⁷ Moreover, the United States Supreme Court declared that it was within the State's power to engage in race regulation.¹⁶⁸ In *Roberts v. City of Boston*,¹⁶⁹ the Court determined that it was constitutional when a school district decided to close an African American high school, yet decided to keep a white European high school open. In addition, the United States Supreme Court handed down *Plessy v. Ferguson*,¹⁷⁰ one of the two¹⁷¹ most venal decisions in American history. *Plessy*, which held that separate but equal facilities were constitutional, was an official government endorsement of "Jim Crow segregation."¹⁷² The significance of *Plessy* cannot be overestimated because it was the "final and most devastating judicial step in the legitimization of racism under state law."¹⁷³

Also, the presumption of inferiority was used in the housing area for the exclusion and substantial segregation of African Americans. In the brief for the City of Louisville, Kentucky, filed in United States Supreme Court in *Buchanan v. Warley*,¹⁷⁴ it was stated "it is shown by philosophy, experience, and legal decisions, to say nothing of Divine Writ, that. . . the races of the earth shall preserve their racial integrity by living socially by themselves."¹⁷⁵ Although the United States Supreme Court

held the Louisville segregation statute unconstitutional, segregation in housing remained because restrictive covenants and other private devices precluded African Americans from living in certain areas.¹⁷⁶

In addition, segregation in education continued to demonstrate our country's perception of African Americans and other minorities as inferior. In *Gong Lum v. Rice*,¹⁷⁷ the United States Supreme Court declared that Chinese Americans have no equal protection claim because States can separate and educate children by race, and that such regulation was within the State's police power.¹⁷⁸ Although the United States Supreme Court in *Brown v. Board of Education of Topeka (Brown I)*¹⁷⁹ held that separate educational facilities can never be equal because of its effect on African Americans, the American schools did not integrate immediately. In actuality, various schools used the courts to prolong the integration process, thus minimizing the impact of *Brown I*.¹⁸⁰ Therefore, *Brown II*¹⁸¹ was handed down. In *Brown II*, the United States Supreme Court placed local school boards in charge of integration, which was supervised by the federal court system. The necessity of the United States Supreme Court's intervention illustrates the perception of inferiority embraced by Americans.

VI. CONCLUSION

Many would hail *Gi Forum, Image De Tejas*¹⁸² as a pivotal decision that helps analyze a possible¹⁸³ constitutional challenge to the use of the racially biased SAT I/ACT as a condition for college admission. After *Gi Forum, Image De Tejas*,¹⁸⁴ there is hope that courts may determine that assessment tests, failing to measure what students actually learn, are fundamentally unfair and in contravention of federal law. Unfortunately, the hope created by *Gi Forum, Image De Tejas*¹⁸⁵ is diminished by *Cureton v. NCCA*¹⁸⁶ and appears to be eliminated by *Alexander*.¹⁸⁷

Although *Alexander* does not involve an educational assessment issue, the United States Supreme Court stated a clear, yet flawed, standard of review for a disparate treatment analysis under Title VI. The decision was split 5-4, which indicates a division among the Court regarding the determination that intentional discrimination is the appropriate standard of review in a disparate impact analysis

and that there is no private right of action to enforce disparate impact regulations promulgated under Title VI. I argue that *Alexander* should not be controlling here.

First, *Alexander* did not involve an educational assessment issue. Second, the majority incorrectly applied jurisprudence when articulating its opinion. Third, the precept of inferiority¹⁸⁸ in our country demands a sensitive race conscious evaluation in all Title VI analyses. Here, our issue involves the use of standardized assessment tests within an educational setting. Previous jurisprudence clearly suggested the necessity of judicial intervention to ensure equality and equity within the educational process.¹⁸⁹ Moreover, research is unwavering regarding the racial bias of the SAT I/ACT.¹⁹⁰ The creators acknowledge the inherent racial bias of the assessment, yet *Alexander* would have us believe that it was the legislative intent¹⁹¹ of the Civil Rights Act of 1964 that allowed governmental discrimination unless the governmental agencies openly admit to the discrimination.

In addition, the analysis section in this article presents the obvious and inherent flaws of the United States Supreme Court majority opinion in *Alexander*. Without being redundant, it is worth reiterating that no court, other than the majority in *Alexander*, has unambiguously declared that all disparate impact analysis under Title VI requires proof of intentional or purposeful discrimination. Yet, the majority in *Alexander* incorrectly relied on case law that it proclaimed supported its proposition, which it clearly did not. I advance the argument that the United States Supreme Court improperly relied on inapplicable case law to support its conclusion.

Finally, the precept of inferiority¹⁹² requires a more thoughtful and complete analysis. A little over a century and a half ago, our country's legal system stated that African Americans were not citizens.¹⁹³ Shortly thereafter, the American legal system declared that African Americans were subject to separate but equal accommodations.¹⁹⁴ As we began the twentieth century, the precept of inferiority¹⁹⁵ continued.¹⁹⁶ Therefore, the necessity of the Civil Rights Act of 1964 was evident. American college officials are aware of this precept of inferiority or should be; yet these officials consciously require a racially biased assessment test as a condition for college admission. I proclaim that such action is in contravention of applicable case law and the legislative intent of Title VI of

The Civil Rights Act of 1964.¹⁹⁷

Frederick Douglass posed the following question over a century ago:

Can American justice, American liberty, American civilization, American law, and American Christianity... be made to include and protect alike and forever all American citizens in the rights which have been guaranteed to them by the organic and fundamental laws of the law?¹⁹⁸

If college and university officials are able to condition admission upon a known and undisputed racially biased assessment test when there are other viable alternatives, the answer to Frederick Douglass' question must, unfortunately, be answered in the negative.

APPENDIX A

Number of African American Students Scores at or Above Selected Points on the 1998 SAT I Examination¹⁹⁹

Point Number	
SAT Total = 900	20, 518
SAT Total = 1000	10, 665
SAT Total = 1100	5, 014
SAT Total = 1200	2, 031

APPENDIX B

2001 COLLEGE BOUND SENIORS AVERAGE TEST SCORES: ACT²⁰⁰

Total Test-takers: 1,069,772
ALL TEST-TAKERS 21.0

ETHNICITY

African-American/Black	16.9
American Indian/Alaskan Native	18.8
Caucasian American/White	21.8
Mexican American/Chicano	18.5
Asian American/Pacific Islander	

- 21.7 Puerto Rican/Hispanic
- 19.4 Other
- 19.5 Multiracial
- 21.2
- HOUSEHOLD INCOME
- Less than \$18,000/year
- 18.1 \$18,000 - \$24,000/year
- 18.9 \$24,000 - \$30,000/year
- 19.6 \$30,000 - \$36,000/year
- 20.2 \$36,000 - \$42,000/year
- 20.6 \$42,000 - \$50,000/year
- 21.0 \$50,000 - \$60,000/year
- 21.5 \$60,000 - \$80,000/year
- 22.0 \$80,000 - \$100,000/year
- 22.5 More than \$100,000/year
- 23.4

APPENDIX C

391 Schools That Do Not Use SAT I or ACT Scores for Admitting Substantial Numbers of Students Into Bachelor Degree Programs as of August 28, 2001

This list includes colleges and universities that do not use the SAT I or ACT to make admissions decisions about substantial numbers of freshman applicants who recently graduated from U.S. high schools. As the footnotes indicate, some schools exempt students who meet grade-point average or class rank criteria while others require SAT or ACT scores but use them only for placement purposes or to conduct research studies. Please check with the school's admissions office to

learn more about specific admissions requirements, particularly for international or non-traditional students.

Key:

- 1 = SAT/ACT used only for placement and/or academic advising
- 2 = SAT/ACT required only from out-of-state applicants
- 3 = SAT/ACT used only when minimum GPA or class rank is not met
- 4 = SAT/ACT required for some programs
- 5 = SAT/ACT not required if submit SAT II series
- 6 = University of Maryland University College is a separate institution from University of Maryland at College Park
- 7 = must submit COMPASS, CPAT, TABE, Stanford Achievement Test, or ASSET if do not submit SAT/ACT

A

- Academy of Art College, San Francisco, CA
- Alabama State University, Montgomery, AL

I

- Alcorn State University, Alcorn State, MS 1,3
- Allen University, Columbia, SC
- American Academy of Art, Chicago, IL
- American Conservatory of Music, Chicago, IL

IL

- Angelo State University, Angelo, TX 3
- Antioch Coll. of Antioch Univ., Yellow Springs, OH

OH

- Arizona State University, Tempe, AZ 3
- Arkansas Baptist College, Little Rock, AR
- Arkansas State University, State University, AR 7

AR 7

- Arlington Baptist College, Arlington, TX 1
- Armstrong University, Berkeley, CA
- Art Institute of Atlanta, Atlanta, GA 7
- Art Institute of Colorado, Denver, CO
- Art Institute of Ft. Lauderdale, Ft. Lauderdale, FL
- Art Institute of Phoenix, Phoenix, AZ
- Art Institute of Portland, Portland, OR

Articles

- Art Institute of Southern California, Laguna Beach, CA
- Art Institutes Int'l San Francisco, San Francisco, CA
- Atlantic College, Guaynabo, PR
- Audrey Cohen College, New York, NY 7
- B**
- Baker College of Cadillac, Cadillac, MI
- Baker College of Flint, Flint, MI
- Baker Coll. of Mt. Clemens, Clinton Township, MI
- Baker College of Muskegon, Muskegon, MI
- Baker College of Owosso, Owosso, MI
- Baker College of Port Huron, Port Huron, MI
- Baltimore Hebrew University, Baltimore, MD
- Baptist Bible College, Springfield, MO
- Bard College, Annandale-on-Hudson, NY
- Bartlesville Wesleyan College, Bartlesville, OK 3
- Bates College, Lewiston, ME
- Bemidji State University, Bemidji, MN^{1,3}
- Benedict College, Columbia, SC
- Berkeley College, White Plains, NY
- Berkeley College of New York City, New York, NY
- Black Hills State University, Spearfish, SD 3
- Boricua College, New York, NY
- Boston Architectural Center, Boston, MA
- Boston Conservatory, Boston, MA
- Bowdoin College, Brunswick, ME
- Brewton-Parker College, Mount Vernon, GA 1
- Burlington College, Burlington, VT
- C**
- Calif. College for Health Sciences, Nat'l City, CA 4
- Calif. College of Arts and Crafts, San Francisco, CA
- Calif. Institute of Integral Studies, San Francisco, CA
- Calif. Institute of the Arts, Valencia, CA
- Calif. Maritime Academy, Vallejo, CA 3
- Calumet College of St. Joseph, Hammond, IN
- Cambridge College, Cambridge, MA
- Cazenovia College, Cazenovia, NY
- Chadron State College, Chadron, NE 1
- Chaparral College, Tucson, AZ
- Charter Oak State College, Newington, CT
- City College, Ft. Lauderdale, FL
- City University, Bellevue, WA
- Clear Creek Baptist Bible College, Pineville, KY
- Cleary College, Ypsilanti, MI
- Cleveland State University, Cleveland, OH
- Coleman College, La Mesa, CA
- College for Lifelong Learning, Durham, NH
- College of Health Sciences, Roanoke, VA
- Coll. of New Rochelle: School of New Resources, NY
- College of the Atlantic, Bar Harbor, ME
- College of the Southwest, Hobbs, NM^{1,3}
- College of Visual Arts, St. Paul, MN⁷
- College of West Virginia, Beckley, WV¹
- Colorado Technical Univ., Colorado Springs, CO
- Columbia College, Chicago, IL
- Columbia College: Hollywood, Tarzana, CA
- Concordia College, Selma, AL
- Concordia University, Portland, OR 3
- Connecticut College, New London, CT 5
- Cornish College of the Arts, Seattle, WA
- CSU Bakersfield, Bakersfield, CA 3
- CSU Chico, Chico, CA³
- CSU Dominguez Hills, Dominguez Hills, CA³
- CSU Fullerton, Fullerton, CA 3
- CSU Hayward, Hayward, CA 3
- CSU Long Beach, Long Beach, CA 3
- CSU Los Angeles, Los Angeles, CA 3
- CSU Northridge, Northridge, CA 3
- CSU Sacramento, Sacramento, CA 3
- CSU San Bernadino, San Bernadino, CA 3
- CSU San Marcos, San Marcos, CA 3
- CSU Stanislaus, Stanislaus, CA 3
- Culinary Institute of America, Hyde Park, NY
- D**
- Dakota State University, Madison, SD 1,3
- Davenport College of Business, Grand Rapids, MI
- Detroit College of Business, Dearborn, MI

- Dickinson College, Carlisle, PA
- Dickinson State University, Dickinson, ND 1,4
- Dowling College, Oakdale, NY
- E
- Eastern Kentucky University, Richmond, KY 1,2
- Eastern Oregon State College, LaGrande, OR 1,3
- Eastman School of Music of the Univ. of Rochester, NY
- East-West University, Chicago, IL
- Edward Waters College, Jacksonville, FL 1
- Emporia State University, Emporia, KS 2,3
- F
- Fairmont State College, Fairmont, WV
- Fashion Institute of Technology, New York, NY
- Ferris State University, Grand Rapids, MI 3
- Fisher College, Boston, MA
- Florida Christian College, Kissimmee, FL
- Florida Memorial College, Miami, FL 1
- Florida Metropolitan Univ., multiple campuses, FL
- Florida State Univ. System, multiple campuses, FL 3,4
- Fort Hays State University, Hays, KS 1
- Franklin and Marshall College, Lancaster, PA 3
- Franklin University, Columbus, OH
- Free Will Baptist Bible College, Nashville, TN 1
- G
- Gallaudet University, Washington, D.C. 7
- Goddard College, Plainfield, VT
- God's Bible School and College, Cincinnati, OH 1
- Golden Gate University, San Francisco, CA
- Grambling State University, Grambling, LA 1
- Grand Canyon University, Phoenix, AZ 3
- Grantham College of Engineering, Sidell, LA
- Gratz College, Melrose Park, PA
- H
- Hamilton College, Clinton, NY 7
- Hampshire College, Amherst, MA
- Harrington Institute of Interior Design, Chicago, IL
- Hartwick College, Oneonta, NY
- Hawaii Pacific University, Honolulu, HI
- Heritage College, Toppenish, WA
- Herzing College, Homewood, AL
- Herzing College, New Orleans, LA
- Hesser College, Manchester, NH
- Hilbert College, Hamburg, NY
- Hobe Sound Bible College, Hobe Sound, FL
- 1
- Humboldt State University (CSU), Arcata, CA 3
- Humphreys College, Stockton, CA
- Huron University, Huron, SD 3
- I
- Illinois Institute of Art, Schaumburg, IL
- Indiana State University, Terre Haute, IN 1
- Indiana University East, Richmond, IN 1
- Institute of Computer Technology, Los Angeles, CA
- Int'l Acad. of Merchandising & Design, Chicago, IL
- Int'l Acad. of Merchandising & Design, Tampa, FL
- International Business College, Fort Wayne, IN
- International College, Naples, FL
- Iowa State University, Ames, IA 1,3
- J
- JFK University, Orinda, CA
- John Jay College of Criminal (CUNY), New York, NY
- John Wesley College, High Point, NC
- Johnson & Wales University, Charleston, SC
- Johnson & Wales University, Denver, CO
- Johnson & Wales University, North Miami, FL
- Johnson & Wales University, Providence, RI
- Jones College, Jacksonville, FL
- Juilliard School, New York, NY
- K
- Kansas State University, Manhattan, KS 2

Articles

- Kent State Univ., Stark, OH
- L
- Lake Erie College, Painesville, OH
- Lamar University, Beaumont, TX1,3
- Lancaster Bible College, Lancaster, PA1
- La Sierra University, Riverside, CA3
- Lawrence Technological University, Southfield, MI 1
- Lewis and Clark College, Portland, OR
- Lincoln University, Jefferson City, MO1
- Lincoln University, Oakland, CA
- Lindsey Wilson College, Columbia, SC1
- Long Island Univ.: Brooklyn Campus, Brooklyn, NY 4
- Longy School of Music, Cambridge, MA
- Louisiana State University, Shreveport, LA 1,3,4
- M
- Magnolia Bible College, Kosciusko, MS
- Manhattan School of Music, New York, NY
- Mannes College of Music, New York, NY
- Martin University, Indianapolis, IN
- Marylhurst College, Marylhurst, OR
- Mayville State University, Mayville, ND1
- McNeese State University, Lake Charles, LA 2
- Medaille College, Buffalo, NY
- Medgar Evers College (CUNY), Brooklyn, NY 4
- Mercy College, Dobbs Ferry, NY
- Metropolitan State University, St. Paul. MN 3
- Michigan Technological Univ., Houghton, MI 1
- Mid-America Bible College, Oklahoma City, OK 1
- Mid-Continent Baptist Bible College, Mayfield, KY
- Middle Tennessee State Univ., Murfreesboro, TN 1,3
- Middlebury College, Middlebury, VT 5
- Midwestern State University, Wichita Falls, TX 3
- Miles College, Fairfield, AL1
- Milwaukee Institute of Art&Design, Milwaukee, WI
- Minnesota Bible College, Rochester, MN 1
- Minnesota State University, Mankato, MN 1,3
- Minot State University, Minot, ND 1
- Mississippi Univ. for Women, Columbus, MS 1,3
- Mississippi Valley State Univ., Itta Bena, MS 1,3
- Missouri Technical School, St. Louis, MO
- Missouri Western State College, St. Joseph, MO
- Montana State Univ.: Billings, Billings, MT 1,3
- Montana State Univ.: Bozeman, Bozeman, MT 1,3
- Montana State Univ.: Northern, Havre, MT 1,3
- Montana Tech of the Univ. of Montana, Butte, MT1,3
- Moorehead State University, Moorhead, MN 3
- Morris College, Sumpter, SC
- Morrison University, Reno, NV
- Mount Holyoke College, South Hadley, MA
- Mt. Sierra College, Monrovia, CA
- Muhlenberg College, Allentown, PA
- N
- NAES College, Chicago, IL
- Naropa University, Boulder, CO
- National American University, Albuquerque, NM
- National American University, Denver, CO
- National American University, Kansas City, MO
- National American University, Rapid City, SD 1
- National American University, St. Paul, MN
- National Business College, Roanoke, VA
- National Hispanic University, San Jose, CA
- National University, La Jolla, CA
- Nazarene Bible College, Colorado Springs, CO
- Newbury College, Brookline, MA

- New College of California, San Francisco, CA
- New England College, Henniker, NH
- New England Institute of Technology,
Warwick, RI
- New School of Architecture, San Diego, CA
- New York City Technical Coll. (CUNY),
Brooklyn, CA
- Nicholls State University, Thibodaux, LA
- Norfolk State University, Norfolk, VA
- Northeastern Illinois University, Chicago, I
L 1,3
- Northeastern State University, Tahlequah,
OK 1,3
- Northern Arizona University, Flagstaff, AZ 3
- Northern Kentucky Univ., Highland Heights,
KY 1,4
- Northern State University, Aberdeen, SD 3
- Northwest College of Art, Poulsbo, WA
- Northwest Nazarene College, Nampa, ID 1,3
- Northwestern Oklahoma State Univ., Alva,
OK 1,3
- Northwestern State University, Natchitoches,
LA 1
- O
- Oakwood College, Huntsville, AL 1
- Oglala Lakota College, Kyle, SD
- Ohio Univ.: Eastern Campus, St. Clairsville,
OH 1
- Ohio Univ., Southern Campus at Ironton, I
ronton, OH
- Ohio Univ., Zaneville Campus, Zaneville, OH
- Oklahoma Panhandle State Univ., Goodwell,
OK
- Oregon State University, Corvallis, OR 3
- P
- Pacific Union College, Angwin, CA
- Patten College, Oakland, CA
- Paul Quinn College, Dallas, TX 1
- Pennsylvania Coll. of Technology,
Williamsport, PA 4
- Peru State College, Peru, NE
- Philander Smith College, Little Rock, AR 1
- Pikeville College, Pikeville, KY 1,4
- Pittsburgh State University, Pittsburgh, KS
1,2
- Portland State University, Portland, OR
- Prescott College, Prescott, AZ
- Prairie View A&M University, Prairie View,
TX 1,3
- Presentation College, Aberdeen, SD
- R
- Ringling School of Art and Design, Sarasota,
FL 3
- Robert Morris College, Chicago, IL
- Rocky Mountain College, Billings, MT 1,3
- S
- St. Ambrose University, Davenport, IA 3
- St. Augustine College, Chicago, IL
- St. Augustine's College, Raleigh, NC 1
- St. John's College, Annapolis, MD
- St. John's College, Santa Fe, NM
- St. Thomas University, Miami, FL 1
- Salish Kootenai College, Pablo, MT
- Sam Houston State University, Huntsville,
TX 3
- San Diego State University (CSU), San
Diego, CA 3
- San Francisco State Univ. (CSU), San Fran
cisco, CA 3
- San Jose State University (CSU), San Jose,
CA 3
- Sarah Lawrence College, Bronxville, NY 5
- Schiller International University, Dunedin, FL
- Selma University, Selma, AL 1
- Seton Hill College, Greensburg, PA
- Sheldon Jackson College, Sitka, AK
- Shimer College, Waukegan, IL
- Sierra Nevada College, Incline Village, NV
- Sinte Gleska University, Rosebud, SD
- Sojourner-Douglass College, Baltimore, MD
- Sonoma State University (CSU), Rohnert
Park, CA 3
- South College, Montgomery, AL
- South College, West Palm Beach, FL
- Southeastern Coll. of the Assemblies of God,
Lakeland, FL 1
- Southeastern Louisiana University,
Hammond, LA 1
- Southeastern Oklahoma State Univ., Durant,
OK 3

Articles

- Southeastern University, Washington, D.C.
- Southern Calif. International College, Santa Ana, CA
- Southern Nazarene University, Bethany, OK 1
- Southern University & A&M College, Baton Rouge, LA 1,2
- Southern University at New Orleans, New Orleans, LA 1
- Southern Vermont College, Bennington, VT
- Southwest State University, Marshall, MN 1,3
- Southwest Texas State University, San Marcos, TX 3
- Southwestern Adventist College, Keene, TX 1
- Southwestern Assemblies of God Coll., Waxahachie, TX
- Southwestern Christian College, Terrell, TX
- State U of NY/Empire State College, Sarasota Springs, NY
- Stephen F. Austin State Univ., Nacogdoches, TX 1,3
- Sterling College, Craftsbury Common, VT
- Stillman College, Tuscaloosa, AL 1
- Strayer College, Washington, D.C. 1
- Sul Ross State University, Alpine, TX 3
- Susquehanna University, Selinsgrove, PA 3
- T
- Tarleton State University, Stephenville, TX 3
- Tennessee Temple University, Chattanooga, TN 3
- Texas A&M Int'l University, Laredo, TX 1
- Texas A&M University-Commerce, Commerce, TX 3
- Texas A&M University-Galveston, Galveston, TX 3
- Texas A&M University-Kingsville, Kingsville, TX 3
- Texas A&M University, College Station, TX 3
- Texas College, Tyler, TX 1
- Texas Southern University, Houston, TX 1
- Texas Tech University, Lubbock, TX 3
- Texas Women's University, Denton, TX 3
- Thomas College, Thomasville, GA
- Thomas Edison College, Trenton, NJ
- Troy State University, Montgomery, AL
- Tuoro College, New York, NY 4
- Turabo University, Gurabo, PR 4
- U
- Union College, Lincoln, NE 1
- Union College, Schenectady, NY 5
- Union Institute, Cincinnati, OH
- Unity College, Unity, ME
- The University of Alaska, Anchorage 1
- University of Alaska, Fairbanks 1
- University of Alaska Southeast, Juneau, AK 1
- University of Arizona, Tucson, AZ 2,3
- Univ. of Arkansas at Monticello, Monticello, AR 1,7
- University of Central Oklahoma, Edmond, OK 3
- University of Great Falls, Great Falls, MT
- University of Guam, Mangilao, GU
- University of Houston, Houston, TX 3
- University of Houston-Downtown, Houston, TX 1
- University of Iowa, Iowa City, IA 3
- University of Kansas, Lawrence, KS 2,3,4
- Univ. of Louisiana at Monroe, Monroe, LA 1
- Univ. of Maine at Augusta, Augusta, ME 4
- Univ. of Maine at Farmington, Farmington, ME
- Univ. of Maine at Ft. Kent, Ft. Kent, ME
- Univ. of Maine at Presque Isle, Presque Isle, ME
- University of Mary Hardin-Baylor, Belton, TX 1,3
- Univ. of Maryland Univ. College, College Park, MD 6
- University of Michigan, Flint, MI 1
- Univ. of Minnesota: Crookston, Crookston, MN
- Univ. of Minnesota: Duluth, Duluth, MN 1,3
- Univ. of Minnesota: Morris, Morris, MN 1,3
- Univ. of Minnesota: Twin Cities, St. Paul, MN 1,3

- University of Mississippi, University, MS 1,3
 - University of Montana: Missoula, Missoula, MO 1,3
 - Univ. of Nebraska: Lincoln, Lincoln, NE 3
 - Univ. of Nebraska: Omaha, Omaha, NE 3
 - University of Nevada: Las Vegas, Las Vegas, NV 1
 - University of Nevada: Reno, Reno, NV 1
 - University of North Alabama, Florence, AL 3
 - University of North Texas, Denton, TX 3
 - University of Oklahoma, Norman, OK 3
 - University of Phoenix, Phoenix, AZ
 - University of Rio Grande, Rio Grande, OH 1,4
 - University of Southern Indiana, Evansville, IN 1,4
 - University of Texas, Austin, TX 3
 - University of Texas, Arlington, TX 3
 - University of Texas at Dallas, Richardson, TX 3
 - University of Texas at El Paso, El Paso, TX 3
 - University of Texas-Pan American, Edinburg, TX 1
 - Univ. of Texas of the Permian Basin, Odessa, TX 3
 - Univ. of Texas at San Antonio, San Antonio, TX 3
 - Univ. of the District of Columbia, Washington, D.C.
 - Univ. of the State of NY/Excelsior Coll., Albany, NY
 - University of Toledo, Toledo, OH 1,2
 - Univ. of Wisconsin-Parkside, Kenosha, WI 3
 - Univ. of Wisconsin-Stevens Point, WI 1,3
 - Univ. of Wisconsin-Stout, Menomonie, WI 1,3
 - Univ. of Wisconsin-Superior, Superior, WI 3
 - Univ. of Wisconsin-Whitewater, Whitewater, WI 1,3
 - Ursinus College, Collegeville, PA 3
 - Utica Coll. Of Syracuse University, Utica, NY 4
- V
- Valley City State University, Valley City, ND 1,3
 - Voorhees College, Denmark, SC 1

- W
- Washburn University of Topeka, Topeka, KS 1
 - Wayne State College, Wayne, NE 1
 - Wayne State University, Detroit, MI 3
 - Webber College, Babson Park, FL 3
 - Weber State University, Ogden, UT 1
 - West Virginia Univ. at Parkersburg, WV
 - Western International University, Phoenix, AZ
 - Western Montana Coll. of the Univ. of MT, MT 1,3
 - Western New Mexico University, Silver City, NM
 - Western Oregon State College, Monmouth, OR 3
 - Westwood College of Technology, Denver, CO 7
 - Wheaton College, Norton, MA
 - White Pines College, Chester, NH
 - Wichita State University, Wichita, KS 2,3
 - Wilberforce University, Wilberforce, OH 1
 - Wiley College, Marshall, TX 1
 - Wilmington College, New Castle, DE 1
 - Woodbury College, Montpelier, VT
- Y
- York College, York, NE 3
 - Youngstown State University, Youngstown, OH 1, 2, 3

¹Kendra Johnson graduated with honors from the University of Baltimore School of Law in May 2003. She will sit for the July 2003 bar. Currently, Kendra is an assistant principal at Cockeysville Middle School within the Baltimore County Public Schools. This paper was written in fulfillment of an upper level writing course, Race and the Law, during fall of 2002 at the University of Baltimore School of Law. Kendra dedicates this paper to Professor Higginbotham, University of Baltimore School of Law Professor, and her parents.

²Peter Schrag, *The War on the SAT*, AMERICAN PROSPECT, Vol. 13, Iss. 8, May 2002.

³ See id.

⁴ *See id.*

⁵ U.S. Const. Amend. XIV, § 1.

⁶ *See* *Hobson v. Hansen*, 393 U.S. 801 (1968) (ruling that IQ tests used to track students were culturally biased because they were standardized on a white, middle-class sample, thus abolishing the tracking system used in the District of Columbia) and *Washington Parish School Board v. Moses*, 409 U.S. 1013 (1972) (ruling that the use of IQ tests and achievement tests for placement into special education and later for tracking was unconstitutional).

⁷ Most arguments began with the Family Education Rights and Privacy Act. 20 U.S.C.S. § 1232g (as amended 2003)(1974), which allows parents and eligible students access to their education records and an opportunity to challenge those records, including the test protocols used for placement of students.

⁸ Legal issues related to teacher testing are similar to those in occupational testing. The Educational Testing Services (ETS), creators of the National Teacher Examination and the Praxis I and II, suffered criticism because there were allegations that the tests were bias.

⁹ *See* *Larry P. v. Riles*, 793 F.2d 969 (1984) (ruling that the use of IQ tests to place student in special education classes was unconstitutional.) and *Parents in Action on Special Education (PASE) v. Hannon*, 506 F. Supp. 831 (1980)(ruling that *Larry P v. Riles* should be distinguished because the school district at bar used more than just IQ tests to place students in special education classes).

¹⁰ Alexander Chuang, *Is the SAT a Fair Test*, at http://www.jiskha.com/features/sat_test_study.html.

¹¹ *See* 42 U.S.C. § 2000d et seq.

¹² This phrase is adapted from the book: A. LEON HIGGINBOTHAM. *SHADES OF FREEDOM*. (Oxford Press 1996). The phrase characterizes the presumption of African Americans' status within the United States of America that I believed is currently embraced.

¹³ This article focuses exclusively on undergraduate institutions admission criteria; therefore, the term assessment refers to SAT I/ACT.

¹⁴ Alexander Chuang, *Is the SAT a Fair Test*, at http://www.jiskha.com/features/sat_test_study.html. The article discusses the rationale college officials advanced for changing college admission criteria.

¹⁵ Students must show their work. *See id.*

¹⁶ *See id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ The ET employs approximately 2,300 regular employees, including staff members with training and expertise in education, psychology, statistics, psychometrics, computer science, and humanities. *See* Peter Schrag, *The War on the SAT*. AMERICAN PROSPECT, Vol. 13, Iss. 8, May 2002.

²⁰ SAT I is the revised SAT. ETS attempted to modify the assessment to eliminate the cultural bias in the original SAT.

²¹ SCHRAG *see supra*.

²² The revised SAT is now named the SAT I. This latest revision of the SAT took place in the latter part of the 1990's.

²³ He also designed the Iowa Test Basic Skills.

²⁴ *See id.*

²⁵ "Scores on the SAT I and ACT are highly correlated; in the three most recent concordance tables, the correlations between individuals" SAT I and ACT scores range from 0.89 to 0.92. COLLEGE ENTRANCE EXAMINATION BOARD, *ADMISSIONS STAFF HANDBOOK FOR THE SAT PROGRAM 1999-2000* (NEW YORK: AUTHOR, 1999).

²⁶ *See id.*

²⁷ *See supra* note 15.

²⁸ *See id.*

²⁹ CHRISTOPHER JENCKS, *THE BLACK-WHITE TEST 55-57* (Brookings Institution Press 1998).

³⁰ *See id.*

³¹ *Id.*

³² *Id.*

³³ *See id.* at 56.

³⁴ *Id.*

³⁵ *See* Jencks, *supra* note 28, at 56.

³⁶ *See id.* at 57.

³⁷ *See id.*

³⁸ *Id.* at 58.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 57.

⁴² *Id.*

⁴³ *See* Jencks, *supra* note 29, at 57. *See also* WILLIAM THOMAS, LARRY P., REVISITED: IQ TESTING OF AFRI-

CAN-AMERICANS. San Francisco: California Publishing Company 60. See Appendix A and B.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ JONATHAN BARON & M. FRANK NORMAN, SATS, ACHIEVEMENT TESTS, AND HIGH-SCHOOL CLASS RANK AS PREDICTORS OF COLLEGE PERFORMANCE, 52 *Educational and Psychological Measurement* 1047 (1992).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ In this context, the term "correct" refers to the number of admissions that resulted in individuals completing their undergraduate education and earning a bachelor's degree.

⁵² See Baron, *supra* at 4.

⁵³ SAUL GEISER WITH ROGER STUDLEY, UNIV. OF CAL., OFFICE OF THE PRESIDENT, UC AND THE SAT: PREDICTIVE VALIDITY AND DIFFERENTIAL IMPACT OF THE SAT I AND SAT II AT THE UNIVERSITY OF CALIFORNIA (2001).

⁵⁴ SAT II is an optional assessment that is content specific.

⁵⁵ *Id.* at 4.

⁵⁶ *Id.*

⁵⁷ *Id.* at 9.

⁵⁸ J. CROUSE & D. TRUSHEIM, THE CASE AGAINST THE SAT I (University of Chicago Press 1988).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ D.R. BRADLEY, W. HISS, M. BRUCE, M. DATTA, S. KINSMAN, S. PROVASNIK & J. SMEDLEY. THE OPTIONAL SAT POLICY AT BATES: A FINAL REPORT (Lewiston, ME: Bates College, Committee on Admissions and Financial Aid, February 1990).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ JENCKS, CHRISTOPHER & MEREDITH, PHILLIPS, THE BLACK-WHITE TEST SCORE GAP 71 (Brooking Institution Press) (1998).

⁶⁵ *Id.*

⁶⁶ *Id.* at 72.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ CHRISTOPHER PLUMBEE, DESPITE COMPLAINTS OF BIAS, THE SAT I IS STILL EFFECTIVE. OLD GOLD AND BLACK: THE STUDENT NEWSPAPER ON WAKE FOREST UNIVERSITY, December 6, 2001.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ AMY MARCUS, Education: TO SPOT BIAS IN SAT I QUESTIONS, TEST MAKER TESTS THE TEST. *Wall St. J.*, August 4, 1999, at B1.

⁷⁴ The admission process for most colleges and universities is similar. The following is needed for admission into most colleges and universities: application fee, a written application, an essay, specific high school coursework, SAT I or ACT score, a possible interview, and a campus visit are encouraged. In addition, most colleges and universities have deadlines for admission, although some have rolling admissions.

⁷⁵ The College Board. THE COLLEGE BOARD COLLEGE HANDBOOK 2001. (New York, College Board, 2001.); CHARLES STRAUGHN II, LOVEJOY'S COLLEGE GUIDE (New York: Macmillan Reference USA 1997.); ROBERT FRANEK, THE BEST 331 COLLEGES (New York: Random House, Inc. 2002.); EDWARD FISKE, THE FISK GUIDE TO COLLEGES (Naperville: Sourcebook, Inc. 2001.); PETERSON, 4-YEAR COLLEGES (Lawrenceville: Peterson 2001).

⁷⁶ *Id.*

⁷⁷ U.S. Const. amend. XIV § 1.

⁷⁸ *Bowen v. Gilliard*, 483 U.S. 587 (1987).

⁷⁹ *Giano v. Senkowski*, 54 F.3d 1050 (2d Cir. 1995).

⁸⁰ *Richetts v. City of Hartford*, 74 F.3d 1397, 1407 (2d Cir. 1996).

⁸¹ *Rickett v. Jones*, 901 F.2d 1058, 1060-61 (11th Cir. 1990).

⁸² See *Giano*, 54 F.3d at 1050.

⁸³ See *Larry P. v. Riles*, 793 F.2d 969 (1984).

⁸⁴ The specific federal statute was Title VI of the Civil Rights Act of 1964.

⁸⁵ See *id.* at 1.

⁸⁶ *Id.*

⁸⁷ *Washington v. Davis*, 426 U.S. 229 (1976) (Two unsuccessful African Americans, who applied for position for the police force of the District of Columbia, claimed

that a test measuring verbal ability, vocabulary, and reading comprehension unconstitutionally discriminated against them. The United States Supreme Court held that the test had not been validated to establish its reliability for measuring subsequent job performance, but no claim was made that administration of the test itself constituted an “intentional” or purposeful” act of discrimination. Therefore, the Court said that there was not a Fourteenth Amendment violation. Intentional discrimination must be allowed and proven to prevail under a Fourteenth Amendment violation claim.)

⁸⁸ See *id.*

⁸⁹ See CHARLES R. LAWRENCE III, *THE ID, THE EGO, AND EQUAL PROTECTION: RECKONING WITH UNCONSCIOUS RACISM*, 39 STAN. L. REV. 317 (1987); F. Michael Higginbotham, *Race Law Cases, Commentary, and Questions* (Carolina Academic Press 2001).

⁹⁰ Michael LaMorte, *SCHOOL LAW CASES AND CONCEPTS 2* (Allyn and Bacon 3d. ed. 1996).

⁹¹ See *id.*

⁹² See *THE CIVIL RIGHTS CASES*, 109 U.S. 3 (1883).

⁹³ *Id.*

⁹⁴ *Holcomb v. Armstrong*, 239 P.2d 545 (Wash. 1952)(requirement of Board of Regents of a state university that all students before registration have an X-ray examination of chest for detection of tubercular infection, constituted “action of the state”).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Zempel v. Uninsured Employers’ Fund*, 938 P.2d 658 (Mont. 1997).

⁹⁸ See *supra* notes 37-55.

⁹⁹ See *United States v. Carolene Products*, 304 U.S. 144, 152 n. 4 (1938).

¹⁰⁰ See *id.*

¹⁰¹ *Id.*

¹⁰² See *supra* note 65, and accompanying text.

¹⁰³ *Id.*

¹⁰⁴ See *supra* notes 76-77 and accompanying text.

¹⁰⁵ See *supra* note 76-77 and accompanying text.

¹⁰⁶ See *supra* note 76-77 and accompanying text.

¹⁰⁷ See *Washington v. Davis*, 426 U.S. 229 (1976).

¹⁰⁸ 42 U.S.C.A. § 2000d.

¹⁰⁹ *Ass’n of Mexican-Americans Education v. State of Cal.*, 195 F. Supp. 678 (E.D. Pa 1996).

¹¹⁰ *National Ass’n for Advancement of Colored People v. Wilmington Medical Center Inc.*, 453 F. Supp 280, 295 (D. Del 1978).

¹¹¹ 42 U.S.C.A. § 2000d-2.

¹¹² *Alexander v. Sandoval*, 532 U.S. 275, 280(2001).

¹¹³ *Texas Peace Officers Ass’n v. City of Galveston, Texas*, 944 F. Supp. 562 (S.D. Tex. 1996).

¹¹⁴ *Alexander v. Sandoval*, 532 U. S. 275 (2001).

¹¹⁵ *Buchanan v. City of Bolivar, Tenn.*, 99 F. 3d 1352 (6th Cir. 1996).

¹¹⁶ *Powel v. Ridge*, 189 F.3rd 387, 394 (3d. Cir. 1999); *Alexander v. Sandoval*, 532 U. S. 275 (2001).

¹¹⁷ *Guardian Ass’n v. Civil Service Com’n of City of New York*, 463 U.S. 582, 584 (1983); See generally *Alexander* at 110.

¹¹⁸ *Gi Forum, De Tejas v. Texas Education Agency*, 87 F. Supp. 2d 667 (2000).

¹¹⁹ *Id.* at 668.

¹²⁰ See *id.* at 679.

¹²¹ *Debra P v. Turlington*, 644 F. 2d 397, 403 (5th Cir. 1981).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Cureton v. NCCA*, 252 F. 3d 267 (2001).

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See *id.* at 1.

¹³¹ See *id.*

¹³² *Alexander v. Sandoval*, 532 U.S. 275 (2001).

¹³³ See *id.*

¹³⁴ See at. 1.

¹³⁵ *Id.*

¹³⁶ *Id.* at 279.

¹³⁷ The opinion split was 5-4.

¹³⁸ *Alexander v. Sandoval*, 532 U.S. at 294, 296 (2001)(Stevens, J., dissenting).

¹³⁹ See *id.* at 296.

¹⁴⁰ Section 601 of The Civil Rights Act 1964 states that Title VI prohibits discrimination based on race, color,

or national origin in covered programs and activities. 42 U.S.C.A. § 2000d.

¹⁴¹ See *id.* See also *Alexander*, 532 U.S. at 296.

¹⁴² Section 602 of The Civil Rights Act 1964 authorizes federal agencies to effectuate § 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. 42 U.S.C.A. § 2000d-1.

¹⁴³ *Alexander*, 532 U.S. at 295.

¹⁴⁴ See *Lau v. Nichols*, 414 U.S. 563 (1974).

¹⁴⁵ See *id.* (Stewart, J. concurring).

¹⁴⁶ 441 U.S. 677 (1979).

¹⁴⁷ See *id.* at 703.

¹⁴⁸ 532 U.S. 275 (2001).

¹⁴⁹ See *id.* at 297 (2001) (Stevens, J., dissenting).

¹⁵⁰ *Alexander*, 532 U.S. at 280. (Section 601 of The Civil Rights Act 1964 states that Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities. 42 U.S.C.A. § 2000d).

¹⁵¹ See *Alexander*, 532 U.S. at 298.

¹⁵² See *Cannon*, 441 U.S. at 680.

¹⁵³ See *id.*

¹⁵⁴ *Cannon*, 441 U.S. at 680.

¹⁵⁵ See *Guardians Assn. v. Civil Serv. Comm'n of New York City*, 463 U.S. 582, 607 (1983) (a clear majority of the Court expressly stated that private parties may seek injunctive relief against governmental practices that have the effect of discriminating against racial and ethnic minorities).

¹⁵⁶ See *Alexander*, 532 U.S. at 307 (citing *Regents v. Bakke*, 438 U.S. at 265, 287 (1978)).

¹⁵⁷ See *Bakke*, 438 U.S. at 265, 308.

¹⁵⁸ *Id.*

¹⁵⁹ See *Alexander*, 532 U.S. at 281. Section 602 of The Civil Rights Act 1964 authorizes federal agencies to effectuate section 601 by issuing regulations, and the Department of Justice (DOJ) in an exercise of this authority promulgated a regulation forbidding funding recipients to utilize criteria or administrative methods having the effect of subjecting individuals to discrimination based on the prohibited grounds. See 42 U.S.C.A. § 2000d.

¹⁶⁰ See *id.*

¹⁶¹ See *Alexander*, 532 U.S. at 303.

¹⁶² See Civil Rights Restoration Act of 1987, § 6, 102 Stat. 31 (codified at 42 U.S.C. § 2000d-4a) (expanding definition of “program”); Rehabilitation Act Amendment of 1986, § 1003, 100 Stat. 1845 (codified at 42 U.S.C. § 2000d-7) (explicitly abrogating States Eleventh Amendment immunity in suits under Title VI).

¹⁶³ For a historical legal analysis of race and the American colonial period, see *IN THE MATTER OF COLOR. A. LEON HIGGINBOTHAM. SHADES OF FREEDOM* (Oxford Press 1978).

¹⁶⁴ Chief Justice Roger Taney, speaking for the majority in *Dred Scott v. Sandford*, 60 U.S. 393 (1856).

¹⁶⁵ *Id.* at 407.

¹⁶⁶ *Civil Rights Cases*, 109 U.S. 3 (1883).

¹⁶⁷ *Crandall v. State*, 10 Conn. 339 (1834).

¹⁶⁸ See *id.*

¹⁶⁹ See *id.*

¹⁷⁰ *Roberts v. City of Boston*, 59 Mass. 198 (1849).

¹⁷¹ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁷² The other case is *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁷³ *Plessy*, 163 U.S. at 550-51.

¹⁷⁴ HIGGINBOTHAM, *SHADES OF FREEDOM* at 119.

¹⁷⁵ *Buchanan v. Warley*, 245 U.S. 60 (1917).

¹⁷⁶ HIGGINBOTHAM, *SHADES OF FREEDOM* at 119.

¹⁷⁷ See *id.* at 125. Eventually, restrictive covenants were held unconstitutional. See *Shelley v. Kraemer*, 334 U.S. 1 (1948).

¹⁷⁸ *Gong Lum v. Rice*, 275 U.S. 78 (1927).

¹⁷⁹ See *id.*

¹⁸⁰ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

¹⁸¹ HIGGINBOTHAM, F. MICHAEL, *RACE LAW CASES, COMMENTARY, AND QUESTIONS* 367 (Carolina Academic Press 2001).

¹⁸² *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955).

¹⁸³ *Gi Forum, Image De Tejas*, 87 F.Supp 2d 667 (2000).

¹⁸⁴ 532 U.S. 275 (2001).

¹⁸⁵ *Image De Tejas*, 87 F.Supp. 2d at 667.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Alexander*, 532 U.S. 275.

¹⁸⁹ See *supra* note 7.

¹⁹⁰ See *Debra P v. Turlington*, 644 F. 2d 397 (5th Cir. 1981) and *Gi Forum, Image De Tejas v. Texas Educational Agency*, F. Supp. 2d at 667.

¹⁹¹ See *supra* notes 37-55.

¹⁹² Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on the ground of race, color, or national origin. 42 USCS § 2000d (1964). 42 USCS § 2000d (1964) imposes upon federal officials not only duty to refrain from participating in discriminatory practices, but affirmative duty to police operations of and prevent such discrimination by state or local agencies funded by them. *NAACP, Western Region v. Brennan*, 360 F. Supp. 1006 (1973).

¹⁹³ See *supra* note 7.

¹⁹⁴ See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

¹⁹⁵ See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

¹⁹⁶ See *supra* note 7.

¹⁹⁷ *Cummings v. County Board of Education*, 175 U.S. 528 (1903) (upholding a Georgia county Board of Education decision to close an all African American school, but keep the all European American school open) and *Berea College v. The Commonwealth of Kentucky*, 211 U.S. 45 (1908) (holding that the state has police power to regulate all state legislation based on race classification, thus a Kentucky statute was upheld).

¹⁹⁸ See *supra* note 137.

¹⁹⁹ See HIGGINBOTHAM, *SHADES OF FREEDOM* (Oxford Press 1996).

²⁰⁰ WILLIAM THOMAS, *LARRY P. REVISITED: IQ TESTING OF AFRICAN AMERICANS* 89 (2000).

²⁰¹ THE COLLEGE BOARD, *THE COLLEGE BOARD SENIORS TEST SCORES* (2001).

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